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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 269

MARGARET M. BRADY, AS ADMINISTRATRIX OF JAMES P. BRADY, DECEASED, PETITIONER,

vs.

ROOSEVELT STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1941.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement	1	1
Record from D. C. U. S., Southern New York	2	1
Complaint filed in Supreme Court of the State of New York, New York County	2	1
Answer	10	7
Motion to dismiss	15	11
Affidavit of Raymond Parmer in support of motion to dismiss	16	11
Affidavit of William E. Collins in support of motion to dismiss	19	13
Examination before trial of Andrew F. Finch submitted in support of motion to dismiss	22	15
Plaintiff's exhibit No. 2—Temporary operating agreement dated June 28, 1937 between the United States Maritime Commission and Roosevelt Steamship Co., Inc.	28	21
Affidavit of August P. Klein in opposition to motion to dismiss	44	32
Opinion on motion to dismiss	53	39
Notice of motion for reargument on motion to dismiss	55	40
Affidavit of Raymond Parmer in support of motion for reargument on motion to dismiss	56	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1942.

—2959

	Original	Print
Record from D. C. U. S., Southern New York—Continued		
Affidavit of August P. Klein in opposition to motion for re-argument on motion to dismiss	62	45
Order denying motion for reargument	68	49
Order denying motion to dismiss complaint	69	50
Statement of evidence	71	51
Colloquy between Court and counsel	71	51
Deposition of Andrew F. Finch	72	52
Testimony of Margaret M. Brady	75	55
Joseph C. Dankelman	82	61
Michael E. Lyons	93	71
Colloquy between Court and counsel	97	75
Testimony of William Wright	100	77
William E. Collins	107	83
Wilbur F. Carley	110	86
Colloquy between Court and counsel	111	86
Testimony of John McCarthy	128	99
Motion for dismissal and a directed verdict and denial thereof	133	103
Charge of the Court	134	104
Verdict	142	110
Motion to set aside verdict and denial thereof	142	111
Note re exhibits	143	111
Judgment	143	112
Notice of appeal	145	112
Stipulation and order as to exhibits in the U. S. C. C. A., Second Circuit	146	113
Stipulation as to record	147	114
Clerk's certificate (omitted in printing)	148	
Opinion, Chase, J.	149	115
Dissenting opinion, Clark, J.	153	118
Judgment	155	119
Clerk's certificate (omitted in printing)	157	
Order granting certiorari	158	121

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MARGARET M. BRADY, as Administratrix of the goods, chattels and credits of James P. Brady, deceased, Plaintiff-Appellee,

vs.

ROOSEVELT STEAMSHIP COMPANY, INC., Defendant-Appellant

STATEMENT

1940

May 31—Summons and complaint served.
July 19—Filed certified record on removal.
July 24—Served answer.

1941

May 2—Served motion to dismiss for lack of jurisdiction of subject matter.
May 21—Opinion of Mandelbaum, J. filed denying motion to dismiss.
June 11—Second notice of motion for reargument of motion to dismiss.
July 8—Orders (2) entered denying motion to dismiss and denying motion for reargument thereof.
Oct. 17, 20 and 21—Trial before Coxe, J.
Oct. 28—Judgment entered for plaintiff $22,760.00.
Nov. 18—Notice of Appeal filed.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

COMPLAINT

The plaintiff complaining against the defendants, by Klein, Kingsley & Klein, her attorneys, respectfully alleges to the Court as follows:

For a First Cause of Action

First. Upon information and belief, that at all the times hereinafter mentioned, the defendant was and still

is a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, with authority to do business within the State of New York.

Second. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, servants and employees, operated and were in control of a certain ship known as the S. S. Unicoi, which said ship was at all the times hereinafter mentioned docked and moored at Pier 58, North River, in the Borough of Manhattan, City of New York.

Third. That on or about the 9th day of July, 1938, James P. Brady, deceased, plaintiff's intestate, was lawfully and properly at and about Pier 58 North River, in the Borough of Manhattan, City of New York, in the per- [fol. 3] formance of his duties as a Customs Inspector and was there for the purpose of making the usual and customary inspection of the ship hereinbefore referred to, which said ship is known as the S. S. Unicoi.

Fourth. That at the time and place hereinbefore referred to, it became necessary for James P. Brady, deceased, plaintiff's intestate to board the said ship by means of a ladder.

Fifth. Upon information and belief, that at all the times hereinafter mentioned, the defendant was the owner of a certain ladder, which was put over the side of the ship to afford access to it to such persons as would board the said ship, and which ladder, the plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Sixth. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, servants and employees, maintained and controlled the said ladder, which plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Seventh. That at the time and place hereinbefore referred to plaintiff's intestate, James P. Brady, deceased, did attempt to board the said ship and in doing so climbed up the said ladder, which ladder was furnished and supplied for this particular purpose by the defendant, its agents, servants and employees.

Eighth. At the time and place hereinbefore mentioned, and while the said James P. Brady, deceased, plaintiff's intestate, was climbing up the aforesaid ladder, suddenly and without notice or warning, one of the rungs of the [fol. 4] said ladder became loose, broken and gave way, causing the said James P. Brady, deceased, plaintiff's intestate, to lose his footing as a result of which he fell with great force and violence sustaining severe injuries, more particularly hereinafter referred to.

Ninth. That as a result of the foregoing, the plaintiff's intestate sustained severe injuries to his head, limbs and body, and certain internal injuries, as a result of which he died on the 20th day of July, 1938.

Tenth. That the aforesaid occurrence and resulting injuries in death were caused solely and wholly by carelessness, recklessness and negligence of the defendant, its agents, servants and employees, in that the said ladder was defective and out of repair and so maintained, and in that the said ladder was carelessly and negligently maintained by the defendant herein in permitting the same to be exposed to the elements for an unreasonable length of time, thereby causing the same to be and become weakened and insufficiently strong enough to sustain the weight of a single normal man who would have occasion to use the same; that the defendant, its agents, servants and employees, failed to properly examine and inspect the aforesaid ladder and the defendant further failed to exercise reasonable care and prudence in the premises and was otherwise negligent.

Eleventh. That all of the aforesaid were sustained only and solely through the carelessness and negligence of the defendant as aforesaid, and James P. Brady, deceased, plaintiff's intestate, was entirely free from any negligent act which contributed thereto.

Twelfth. That on or about the 3rd day of May, 1939, Limited Letters of Administration upon the Estate of the said James P. Brady, were duly issued and granted [fol. 5] by the Surrogate's Court of the County of Westchester, State of New York, to Margaret M. Brady, appointing her Administratrix of the goods, chattels and credits of the said deceased, and the plaintiff thereupon

duly qualified and entered upon her duties as such Administratrix, and is now such Administratrix.

Thirteenth. That the decedent left him surviving his widow, Margaret M. Brady, age 61, a son, James W. Brady, age 21, and a daughter, Virginia Brady, age 16 years.

Fourteenth. That the said James P. Brady, deceased, was of the age of 62 years at the time of his death, and prior thereto had been in good health and in possession of all his facilities, and was steadily employed at his work as that of a Customs Inspector, and that the aforesaid widow, son and daughter, have lost the companionship, comfort, society and services of the said James P. Brady, deceased, and the support from his contributions, and that they have been damaged by his death in the sum of $75,000.00.

Fifteenth. That this action was commenced within two (2) years after the death of the said James P. Brady, deceased.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Seventy-five Thousand ($75,000.00) Dollars damages, together with the costs and disbursements of this action.

For a Second Cause of Action

Sixteenth. Upon information and belief, that at all the times hereinafter mentioned, the defendant was and still is a [fol. 6] foreign corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, with authority to do business within the State of New York.

Seventeenth. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, servants and employees, operated and were in control of a certain ship known as the S. S. Unicoi, which said ship was at all the times hereinafter mentioned docked and moored at Pier 58, North River, in the Borough of Manhattan, City of New York.

Eighteenth. That on or about the 9th day of July, 1938, James P. Brady, deceased, plaintiff's intestate, was

lawfully and properly at and about Pier 58, North River, in the Borough of Manhattan, City of New York, in the performance of his duties as a Customs Inspector and was there for the purpose of making the usual and customary inspection of the ship hereinbefore referred to, which said ship is known as the S. S. Unicoi.

Nineteenth. That at the time and place hereinbefore referred to, it became necessary for James P. Brady, deceased, plaintiff's intestate, to board the said ship by means of a ladder.

Twentieth. Upon information and belief, that at all the times hereinafter mentioned, the defendant was the owner of a certain ladder, which was put over the side of the ship to afford access to it to such persons as would board the said ship, and which ladder, the plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Twenty-first. Upon information and belief, that at all the times hereinafter mentioned, the defendant, its agents, [fol. 7] servants and employees, maintained and controlled the said ladder, which plaintiff's intestate used in boarding the ship to perform his duties as a Customs Inspector.

Twenty-second. That at the time and place hereinbefore referred to, plaintiff's intestate, James P. Brady, deceased, did attempt to board the said ship and in doing so climbed up the said ladder, which ladder was furnished and supplied for this particular purpose by the defendant, its agents, servants and employees.

Twenty-third. At the time and place hereinbefore mentioned, and while the said James P. Brady, deceased, plaintiff's intestate, was climbing up the aforesaid ladder, suddenly and without notice or warning, one of the rungs of the said ladder became loose, broken and gave way, causing the said James P. Brady, deceased, plaintiff's intestate, to lose his footing as a result of which he fell with great force and violence sustaining severe injuries, more particularly hereinafter referred to.

Twenty-fourth. That as a result of the foregoing, the plaintiff's intestate sustained severe injuries to his head, limbs and body, and certain internal injuries, as a result of which he died on the 20th day of July, 1938.

Twenty-fifth. That the aforesaid occurrence and resulting injuries in death were caused solely and wholly by the carelessness, recklessness and negligence of the defendant, its agents, servants and employees, in that the said ladder was defective and out of repair and so maintained, and in that the said ladder was carelessly and negligently maintained by the defendant herein in permitting the same to be exposed to the elements for an unreasonable length [fol. 8] of time, thereby causing the same to be and become weakened and insufficiently strong enough to sustain the weight of a single normal man who would have occasion to use the same; that the defendant, its agents, servants and employees, failed to properly examine and inspect the aforesaid ladder and the defendant further failed to exercise reasonable care and prudence in the premises and was otherwise negligent.

Twenty-sixth. That all of the aforesaid were sustained only and solely through the carelessness and negligence of the defendant as aforesaid, and James P. Brady, deceased, plaintiff's intestate, was entirely free from any negligent act which contributed thereto.

Twenty-seventh. That on or about the 3rd day of May, 1939, Limited Letters of Administration upon the Estate of the said James P. Brady, were duly issued and granted by the Surrogate's Court of the County of Westchester, State of New York, to Margaret M. Brady, appointing her Administratrix of the goods, chattels and credits of the said deceased, and the plaintiff thereupon duly qualified and entered upon her duties as such Administratrix, and is now such Administratrix.

Twenty-eighth. That the decedent left him surviving his widow, Margaret M. Brady, age 61, a son, James W. Brady, age 21, and a daughter, Virginia Brady, age 16 years.

Twenty-ninth. That this action was commenced within two (2) years after the death of the said James P. Brady, deceased.

Thirtieth. That as a result of the foregoing, plaintiff's intestate sustained severe injuries to his head, limbs and [fol. 9] body, a severe shock to his nervous system and certain internal injuries and has been caused to suffer severe

physical pain and mental anguish, from the date of said occurrence until the date of his death on July 20th, 1938; that during this period of time, plaintiff's intestate was confined to his bed and home as a result thereof and was caused to abstain from the duties of his vocation, and was compelled to expend and become obligated to expend sums of money for medical attention and medicines.

Thirty-first. That the plaintiff as Administratrix of the goods, chattels and credits of the said James P. Brady, now deceased, has a right of action to recover damages for personal injuries accruing before the death of the said James P. Brady, pursuant to the provisions of the Decendent's Estate Law, Sections 119 and 120 thereof.

Wherefore, the plaintiff demands judgment against the defendant on the First Cause of Action, for the sum of Seventy-five Thousand ($75,000.00) Dollars damages, together with the costs and disbursements of the action, and on the Second Cause of Action for the sum of Five Thousand ($5,000.00) Dollars damages, together with the costs and disbursements of the action.

Klein, Kinsley & Klein, Attorneys for Plaintiffs,
Office & P. O. Address, No. 342 Madison Avenue,
Borough of Manhattan, City of New York.

[fol. 10] In United States District Court, Southern District of New York

Answer

Roosevelt Steamship Company, Inc., the defendant herein, answering the complaint by its attorneys, Kirlin, Campbell, Hickox, Keating & McGrann, alleges on information and belief as follows:

Answering the First Cause of Action

First. It admits the allegations contained in paragraph numbered First of the complaint.

Second. It denies each and every allegation contained in paragraph numbered Second of the complaint.

Third. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every

allegation contained in paragraph numbered Third of the complaint..

Fourth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Fourth of the complaint.

Fifth. It denies each and every allegation contained in paragraph numbered Fifth of the complaint.

Sixth. It denies each and every allegation contained in paragraph numbered Sixth of the complaint.

[fol. 11] Seventh. It denies each and every allegation contained in paragraph numbered Seventh of the complaint.

Eighth. It denies each and every allegation contained in paragraph numbered Eighth of the complaint.

Ninth. It denies each and every allegation contained in paragraph numbered Ninth of the complaint.

Tenth. It denies each and every allegation contained in paragraph numbered Tenth of the complaint.

Eleventh. It denies each and every allegation contained in paragraph numbered Eleventh of the complaint.

Twelfth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Twelfth of the complaint.

Thirteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Thirteenth of the complaint.

Fourteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Fourteenth of the complaint.

Fifteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Fifteenth of the complaint.

[fol. 12] Further Answering the Complaint, and Particularly the second Alleged Cause of Action Contained Therein, the Defendant Further Alleges:

Sixteenth. It admits the allegations contained in paragraph numbered Sixteenth of the complaint.

Seventeenth. It denies each and every allegation contained in paragraph numbered Seventeenth of the complaint.

Eighteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Eighteenth of the complaint.

Nineteenth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Nineteenth of the complaint.

Twentieth. It denies each and every allegation contained in paragraph numbered Twentieth of the complaint.

Twenty-first. It denies each and every allegation contained in paragraph numbered Twenty-first of the complaint.

Twenty-second. It denies each and every allegation contained in paragraph numbered Twenty-second of the complaint.

Twenty-third. It denies each and every allegation contained in paragraph numbered Twenty-third of the complaint.

[fol. 13] Twenty-fourth. It denies each and every allegation contained in paragraph numbered Twenty-fourth of the complaint.

Twenty-fifth. It denies each and every allegation contained in paragraph numbered Twenty-fifth of the complaint.

Twenty-sixth. It denies each and every allegation contained in paragraph numbered Twenty-sixth of the complaint.

Twenty-seventh. It denies that it has any knowledge or information sufficient to form a belief thereof as to each

and every allegation contained in paragraph numbered Twenty-seventh of the complaint.

Twenty-eighth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Twenty-eighth of the complaint.

Twenty-ninth. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation contained in paragraph numbered Twenty-ninth of the complaint.

Thirtieth. It denies each and every allegation contained in paragraph numbered Thirtieth of the complaint.

Thirty-first. It denies each and every allegation contained in paragraph numbered Thirty-first of the complaint.

[fol. 14] Further Answering the Complaint, and as a First, Separate, Complete and Distinct Defense Thereto, Defendant Alleges Upon Information and Belief as Follows:

Thirty-second. That if the plaintiff's intestate received any injuries, as alleged in the complaint, said injuries were caused in whole or in part by plaintiff's intestate's own negligence, and were not caused or contributed to in any manner by any negligence of this defendant.

Further Answering the Complaint, and as a Second, Separate, Complete and Distinct Defense Thereto, Defendant Alleges Upon Information and Belief as Follows:

Thirty-third. That the injuries to plaintiff's intestate arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to plaintiff's intestate at and before the said injury, and all of said risks, dangers and hazards had been assumed by plaintiff's intestate.

Wherefore this defendant demands that the complaint herein be dismissed with costs to the defendant as against the plaintiff, and for such other, further and different relief as the justice of the cause may require.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, by Raymond Parmer, a member of the firm, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

SIRS:

Please take notice that on the annexed affidavit of Raymond Parmer, sworn to the 30th day of April, 1941, on the affidavit of William E. Collins, sworn to on the 1st day of May, 1941, on the examination of Andrew F. Finch, sworn to on October 8, 1940, on the written contract made between the defendant and the United States Maritime Commission on June 28, 1937, and on all the pleadings and proceedings heretofore had herein, the defendant will move this court, at a stated term for the hearing of motions, to be held in Room 506, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 6th day of May, 1941, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein, on the ground that the court has not jurisdiction of the subject matter of the action.

And for such other, further and different relief as the justice of the cause may require.

Dated, New York, April 29, 1941.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Roosevelt Steamship Company, Inc., Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 16] To: Klein, Kingsley & Klein, Esqs., Attorneys for Plaintiff, Office & P. O. Address, 342 Madison Avenue, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RAYMOND PARMER IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Raymond Parmer, being duly sworn, says:

I am an attorney at law and a member of the firm of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for the defendant, Roosevelt Steamship Company, Inc.

The plaintiff claims that her husband was a customs guard and that on July 9, 1938, he was climbing a ladder tied to the steamship Unicoi, when the ladder broke. This, it is claimed, caused him to be injured by reason of which he died on July 20, 1938. It is understood that he died of appendicitis.

As appears by the papers on which this motion is made, the steamship Unicoi was a vessel owned and operated by the United States of America at the time of the alleged injury to the plaintiff's intestate. Roosevelt Steamship Company, Inc., the present defendant, was employed as [fol. 17] a managing agent on behalf of United States of America in connection with the operation of the vessel. This appears by the testimony of Andrew F. Finch, taken on behalf of the plaintiff on September 17, 1940, a copy of which is annexed hereto. It appears also, by reason of the contract between the defendant, Roosevelt Steamship Company, Inc., and the United States Maritime Commission, dated June 28, 1937, a copy of which is annexed hereto.

It appears further that the defendant, Roosevelt Steamship Company, Inc., did not possess or operate the steamship Unicoi on its own behalf but on behalf of the United States of America. Both the profits and the losses belong to the United States.

By reason of this any suit on account of a tort occurring to plaintiff's intestate should be brought pursuant to the Suits in Admiralty Act against the United States of America. It is not proper to sue Roosevelt Steamship Company, Inc., the agent of the United States.

In *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, the Supreme Court of the United States said, at p. 326:

"On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions."

And at p. 327, it said:

"It follows that on disclosure—whether by pleading or proof—of the facts aforesaid, the District Court should have dismissed each case for lack of jurisdiction."

[fol. 18] The above was said with regard to suits brought not only against the Shipping Board but also as regards suits brought against private corporations who were acting on behalf of the United States.

The United States Maritime Commission is the successor of the United States Shipping Board Emergency Fleet Corporation.

If any judgment should be obtained against Roosevelt Steamship Company, Inc., the money required to pay it would come from the United States Treasury. It would be one of the agent's expenses which the United States has agreed to pay.

Annexed hereto the court will find also the affidavit of William E. Collins, United States Attorney in charge of maritime matters at New York. His affidavit speaks for itself. It is submitted so that there can be no doubt that this is a case where suit should be brought against the United States of America under the Suits in Admiralty Act because the United States is the real party affected.

Wherefore I respectfully pray, on behalf of Roosevelt Steamship Company, Inc., that the present action be dismissed for lack of jurisdiction.

Raymond Parmer.

Sworn to before me this 30th day of April, 1941.
Andrew J. Doyle, Notary Public, Queens County.

[fol. 19] In United States District Court

Affidavit of William E. Collins in Support of Motion

State of New York,
County of New York, ss:

William E. Collins, being duly sworn, deposes and says:

I am District Counsel of the United States Maritime Commission for the North Atlantic District, and Special Assistant to the United States Attorney for the Southern District of New York, and as such, am generally in charge of admiralty matters for the United States Government in this district.

I have read the affidavit of Raymond Parmer, Esq., verified May 1st, 1941, and other papers attached to the

notice of motion made by the defendant herein, for an order dismissing the complaint for lack of jurisdiction.

I am submitting this affidavit in support of the motion because of the interest of the United States of America, as represented by the United States Maritime Commission, owner of the M/S Unicoi at the times involved in the action, as well as because of the interest of the Government in the question involved.

The M/S Unicoi was at the times involved in the action, operated by Roosevelt Steamship Company, Inc., as agent for the United States of America, pursuant to an operating agreement on the form known as "Temporary [fol. 20] Operating Agreement 1937." This agreement is in all substantial respects similar to the older so-called "M. O. 4 Agreement" between the Government, as represented by the former United States Shipping Board, and its operating companies. The latter agreement was held by the United States Circuit Court of Appeals for the Second Circuit to be clearly an agency agreement. *Admiral Oriental Line* v. *United States*, 86 Fed. (2d) 201.

Under both agreements, expenses of operation have been paid by United States Treasury funds. Any judgment which the plaintiff in this case might obtain against the Roosevelt Steamship Company, Inc., would be paid out of the United States Treasury.

In such circumstances, as has been pointed out in the said affidavit of Raymond Parmer, Esq., the Supreme Court has held that suit on any maritime cause of action must be brought against the United States. *Johnson* v. *Fleet Corporation*, 280 U. S. 320.

The Government, through the former United States Shipping Board, and the present United States Maritime Commission, has accordingly taken the uniform position that such actions should be brought in admiralty.

Accordingly, after the decision in the Johnson case, numerous cases in the Federal and State courts were dismissed for lack of jurisdiction of the subject matter, on the authority of the Johnson case. Among the numerous cases thus dismissed were the following, as taken from the files in my office:

Shea v. *Export Steamship Corporation and United States Shipping Board Emergency Fleet Corporation*, 253 N. Y. 17.

Riley v. *Fleet Corporation and Mississippi Shipping Co.*, S. D. N. Y., Index No. L 45-11, dismissed April 4, 1930.
[fol. 21] *Nelson* v. *Consolidated Navigation Co., Inc.*, City Court, City of New York, Index No. 13331—1930, dismissed May 8, 1930.

Burke v. *A. H. Bull & Co., Inc.*, Supreme Court, Richmond County, no index number, dismissed April 15, 1930.

Kluyskens v. *Black Diamond Steamship Corporation*, Municipal Court, Manhattan, First District, Index No. 31949—1929, dismissed April 12, 1930.

Accordingly it is submitted that the above entitled action should be dismissed for lack of jurisdiction of the subject matter.

This affidavit is submitted in support of the application made by Roosevelt Steamship Company, Inc., the defendant herein, and the United States does not thereby appear in this proceeding nor submit itself to the jurisdiction of this Court.

William E. Collins.

Sworn to before me this 1st day of May, 1941.
Robert M. Estes, Notary Public, New York County.

[fol. 22] In United States District Court

Examination Before Trial of Andrew F. Finch Submitted in Support of Motion

Examination before trial of Andrew F. Finch, Assistant Comptroller of defendant, returnable and held on the 17th day of September, 1940, at 11 A. M. at the office of Kirlin, Campbell, Hickox, Keating & McGrann, 120 Broadway, New York City.

Appearances:

Charles Kramer, of counsel for plaintiff.
Raymond Parmer, of counsel for defendant.
Andrew F. Finch, in person.

Examination:

Q. What is your full name?
A. Andrew F. Finch.

Q. Where do you reside?

A. 721 49th Street, Brooklyn, N. Y.

Q. In what capacity are you connected with the defendant?

A. Assistant Comptroller.

Q. And for how many years have you been the Assistant Comptroller?

A. Since 1936. Prior to that time from 1925 to 1936, treasurer.

Q. As Assistant Comptroller, generally, what are your duties?

A. To do with all the financial matters connected with the firm.

Q. Are you familiar with the ship S. S. Unicoi?

A. Yes.

Q. What type of a ship was it?

A. It was a motor ship, freight carrying vessel.

[fol. 23] Q. Approximately how many tons was it, if you know?

A. Around 9000 dead weight tons.

Q. Do you know how long the boat was?

A. About 400 feet, I should say.

Q. What type of cargo did it carry?

A. Various types, general cargo, all types.

Q. Was it an ocean going boat?

A. Yes.

Q. Did it carry passengers?

A. The Unicoi, I believe, had accommodations for 12 passengers.

Q. On or about July 9th, 1938, the day of the accident to James P. Brady, how large was its crew?

A. The crew was 35 to 36 in number at all times.

Q. That includes the captain, and all the sailors and seaman?

A. Yes.

Q. And did the boat have any particular points where it would travel to and from?

A. Yes, it was scheduled in North Atlantic ports and proceeded to ports in India and return to the United States ports.

Q. Who owned the boat?

A. The United States Maritime Commission.

Q. What year did the United States Maritime Commission own the boat?

A. I don't know exactly what year.
Q. Approximately?
A. Around 1920.
Q. Who owned the boat before him in 1920?
A. I don't know.
Q. Was that the year the boat was built?
A. I am pretty sure it was around that time that the boat was built.
Q. Did the defendant operate the boat?
A. Yes.
Q. Did the defendant operate the boat on July 9th, 1938 and prior thereto?
A. Yes.
Q. Was there a contract entered into between the U. S. Maritime Commission and the defendant with reference to the operation of the boat?
A. Yes.
[fol. 24] Q. Is that a written contract?
A. Yes.
Q. May I see it please?

(Contract shown to Mr. Kramer.)

Q. How long does this contract run?
A. It was for six months originally and has been extended from time to time.
Q. And was the contract in operation on July 9th, 1938?
A. Yes.
Mr. Kramer: May I have a copy of this contract?
Mr. Parmer: I will furnish the plaintiff with a photostatic copy of the agreement entered into between the United States Maritime Commission and the defendant on June 28th, 1937 with reference to the operation of the boat S. S. Unicoi.
Mr. Kramer: Page 2 of the operating agreement provides:

1. *Appointment & Acceptance:* The Owner (United States Maritime Commission, hereby designates the Managing Agent (Roosevelt Steamship Company, Inc.) as its Managing Agent to manage, operate, and conduct the business of the Line for the period, in the manner, and subject to the terms and conditions herein set forth, for and on behalf of the Owner and under its supervision and direction. The managing Agent hereby accepts said appointment.

Mr. Kramer: Paragraph 7 provides:

7. *Managing Agent to Man, Supply and Operate:* The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe; and to certify or [fol. 25] approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied.

Q. Under paragraph 7 of the agreement, am I correct in saying that the defendant hired the men on the boat subject to the supervision of the government?

A. No.

Q. How would you say that?

A. We had nothing to do with the hiring of the men outside of the licensed officers whom we chose.

Q. Did you hire the licensed officers?

A. We recommended the licensed officer to the government for approval.

Q. What do you mean by licensed officers?

A. Chief officers, first mate, chief engineer, assistant chief engineer, chief steward, second mate and captain.

Mr. Kramer: Paragraph 11 provides:

11. *Repairs and Maintenance:* The Managing Agent shall, subject to such regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements. No extraordinary repairs or expenses of any kind shall be made by the Managing Agent except in cases of serious emergency without first securing in writing the authorization of the Owner.

[fol. 26] Q. Did the defendant hire the captain of the S. S. Unicoi?

A. The captain was recommended to the Maritime Commission by the defendant.

Q. Was he accepted?

A. Yes.

Q. What was the name of the Captain of the S. S. Unicoi on July 9th, 1938?

A. Mr. Joseph Dixon.

Q. Did the defendant also hire the other officers of the S. S. Unicoi on or prior to July 9th, 1938?

A. The other officers of the Unicoi were also recommended to the Maritime Commission for approval.

Q. And were they approved?

A. Yes.

Q. How long had Captain Dixon been the captain of the S. S. Unicoi prior to July 9th, 1938?

A. I cannot state off hand without looking up the record.

Q. Did the defendants hire the rest of the crew aside from the officers of the S. S. Unicoi on or prior to July 9th, 1938?

A. No.

Q. Did they recommend the employees?

A. No.

Q. Who hired them?

A. The Maritime Commission.

Q. Did the defendant approve the selection by the Maritime Commission of the crew?

A. We had nothing to say in the matter.

Q. Are you familiar with the docking of the S. S. Unicoi at pier 58, North River, in the Borough of Manhattan, on or prior to July 9th, 1938?

A. I was not present at the docking.

Q. Do you know when it was that the boat docked?

A. From the records, she docked on July 9th, 1938.

Q. At about what time?

A. I don't know.

Q. Would your records indicate that?

A. Yes.

Q. Do you have the records with you?

A. No.

Q. Where had the boat started from prior to its arrival at pier 58 on July 9th, 1938?

A. Port Said, Egypt.

Q. Did it have cargo on board that was to be unloaded at pier 58?

A. Yes.

[fol. 27] Q. Did it carry any passengers on that trip?

A. I cannot say without looking up the record.

Q. Will you fill it in?

A. Yes. Carried 5 adults and 1 child.

Q. Are you familiar with the practice of custom inspectors of boarding the boat when they dock?

A. No, sir.

Q. Who would be?

A. Our port superintendent or port captain.

Q. What are their names?

A. The port superintendent is Peter Fay and the captain was Captain Cummings.

Q. Are they both in the employ of the defendant?

A. Yes.

Q. Do you have any statement in your file from either Peter Fay or Captain Cummings with reference to the accident to James P. Brady on July 9th, 1938?

A. I don't have such a record in my file. I believe the record will be on file in the claim department of the company.

Mr. Kramer: Mr. Parmer, will you furnish us with a copy of the report?

Mr. Parmer: I do not agree to do that.

Mr. Kramer: Will you agree to let us look at it?

Mr. Parmer: No.

Q. Are you familiar with the facts surrounding the accident that occurred to James P. Brady while boarding the S. S. Unicoi on July 9th, 1938?

A. No, sir.

Q. Do you know who is familiar with it?

A. No.

Q. Are you familiar with the use of the ladder put over the side of the boat to permit persons to board the ship and particularly the deceased, James P. Brady who was a customs inspector on the day of the accident?

A. No.

Q. Are you familiar with any of the circumstances surrounding the accident that occurred to James P. Brady on July 9th, 1938?

A. No, sir.

[fol. 28] Q. Do you know who is?

A. No, sir.

Q. Well, who would be?

A. Perhaps the pier superintendent, Mr. Fay. I wouldn't know.

Q. When was the first time you learned about the accident to James P. Brady on July 9th, 1938?

A. Only very recently.

Q. Do you know whether the accident was reported to the company?

A. No, sir, I don't.

Mr. Kramer: This examination before trial is concluded as to the testimony of this witness, but without prejudice to the plaintiff to examine such other witnesses it sees fit.

(sgd.) Andrew F. Finch

Sworn to before me this 8 day of October, 1940.
(Sgd.) Terence F. Conlon, N. P. (Seal.)

PLAINTIFF'S EXHIBIT No. 2

Temporary Operating Agreement 1937

This Agreement made on the 28th day of June, 1937, between the United States Maritime Commission, hereinafter sometimes designated as the Owner, and Roosevelt Steamship Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, hereinafter designated as the Managing Agent.

Whereas, the Commission is the Owner of the following vessels (herein sometimes referred to as the Owner's ves-[fol. 29] sels) presently managed and operated for its account by the Managing Agent in a Line known as the American Pioneer Line (herein sometimes referred to as the Line):

Name	*Deadweight Tons*
MS. City of Dalhart	9185
MS. City of Elwood	9116
MS. City of Rayville	9050
MS. Jeff Davis	9183
MS. New Orleans	9084
MS. Potter	9000
MS. Sawokla	9105
MS. Tampa	9120
MS. Unicoi	9135
MS. Ward	9009
MS. Wichita	9147
MS. Yomachichi	9235

and

Whereas, pursuant to Section 704 of the Merchant Marine Act, 1936, (herein referred to as the Act) the existing Operating Agreement with respect to the Line is to be terminated and discontinued by June 29, 1937, and no voyages may be commenced under said agreement on or after that date; and

Whereas, pursuant to the provisions of the Act, and particularly Sections 705, 706, and 707 thereof, the Owner has advertised the Line for charter but, having failed to receive satisfactory bids has, pursuant to Section 707 of the Act and the provisions of said advertisement, rejected all bids and determined, pursuant to Section 707(c), to operate the Line until conditions appear to be more favorable for the sale of such vessels or a re-advertising of the Line for private charter; and

[fol. 30] Whereas, considering particularly the public interest in the continued operation of the Line, the practical impossibility of satisfactorily readvertising the Line or providing for the establishment of a managing staff prior to the expiration of the present Operating Agreement, and the desirability of avoiding the danger of disruption of service through change in management during the limited period of this agreement, the Owner has determined that, in order to carry on the activities authorized by the Act, it is necessary for the Owner to enter into this agreement for the operation of the Line for its account by the Managing Agent for the period and subject to the terms and conditions hereinafter set forth; and

Whereas, the Managing Agent has indicated its willingness to undertake the management and operation of the Line for said period and subject to said terms and conditions;

Now, Therefore, in consideration of the premises and of the covenants and agreements herein set forth, the parties hereto agree as follows:

1. *Appointment and Acceptance.* The Owner hereby designates the Managing Agent as its Managing Agent to manage, operate, and conduct the business of the Line for the period, in the manner, and subject to the terms and conditions herein set forth, for and on behalf of the Owner and under its supervision and direction. The Managing Agent hereby accepts said appointment.

2. *Period of Agreement.* Subject to the terms and conditions set forth herein, this agreement shall apply to all voyages commenced on or after June 29, 1937, and on or before December 31, 1937; provided, however, that the [fol. 31] Owner may terminate this agreement upon thirty (30) days' written notice to the Managing Agent, in which event no voyage shall be commenced under this agreement after the expiration of such thirty day period. A voyage shall be deemed to commence when the preceding voyage has been terminated and new voyage activity has started. The Owner may determine in particular cases or by general regulations the time of termination of old voyages and commencement of new voyage activity. In determining whether or not a voyage is commenced within the period of this agreement, in case of a lapse of time between the termination of a voyage and the commencement of a new voyage activity, however, the new voyage shall not be antedated to the time of termination of the old voyage.

3. *Allocation of Vessels.* The Owner hereby allocates the above named to the Managing Agent for management and operation under this agreement. It is understood that other vessels may hereafter be substituted for or added to the aforesaid vessels from time to time, and that the Owner may withdraw any vessel or vessels now or hereafter allocated for service on the Line which, in the judgment of the Owner, is not required in the operation of the Line.

4. *Trade, Route and Trade Name.* The Managing Agent shall manage and operate said vessels on the following berth service, and not otherwise:

(a) Between United States Atlantic and Gulf ports via the Suez Canal and ports in the Red Sea, India and Ceylon in the Karachi-Calcutta range, with the privilege of calling at ports in Burma and North Atlantic Canadian ports.

[fol. 32] (b) Between United States Atlantic and Gulf ports and ports in Australia via the Panama Canal with option of calls at ports in New Zealand and/or Tasmania or other ports en route and with the privilege of calling at North Atlantic Canadian ports.

(c) Between United States Atlantic ports via Panama Canal and ports in Hawaii, Philippine Islands, China, Japan and other Far East ports and with the privilege of calling at North Atlantic Canadian ports.

The Managing Agent shall manage and operate the said vessels exclusively under the trade name AMERICAN PIONEER LINE. Such trade name shall remain the property of the Owner and the Managing Agent shall have no further right to the use of said trade name upon termination of this agreement as herein provided.

5. *Sailing Schedule: Interruption of Service.* The Managing Agent agrees that during the period of this agreement, it will make minimum sailings at the rate of ten (10) outward sailings per year on the berth service described in clause (a) of Article 4 hereinabove, and at the rate of nine (9) outward sailings per year on each berth service described in clauses (b) and (c) of Article 4 hereinabove, on sailing schedules fixed or approved by the Owner. Failure of the Managing Agent to make a voyage in accordance with any such schedule shall not be deemed to be a breach of its obligations under this agreement if it is prevented from making such voyage by acts of God, force majeure, accident, strikes or other labor disturbances, war, insurrections, weather conditions, loss of or damage to vessels, or, without limiting the foregoing, any other cause not within the control of the Managing Agent, whether of the class of causes hereinabove enumerated or not, it being understood that the cause of any interruption in so far as it [fol. 33] may be under the control of the Managing Agent shall be remedied by the Managing Agent, as directed by the Owner, with all reasonable dispatch and performance resumed at the earliest practicable time after cessation of the cause of such interruption.

6. *Conduct of Business of the Line.* The vessels shall be used only for the carriage of lawful merchandise and passengers. All business shall be carried on in the name of the Line for the account of the Owner. The Managing Agent shall, as directed by the Owner, collect all monies and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents. The Managing Agent agrees to continue to book cargo for the vessels of the Line for

voyages beyond the termination of this agreement, provided that all such commitments shall be subject to such instructions as may be issued by the Owner.

7. *Managing Agent to Man, Supply and Operate.* The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such em-
[fol. 34] ployees if it shall have reason to be dissatisfied.

8. *Lawful and Efficient Operation.* The Managing Agent agrees to conduct its operations with respect to the vessels, services, routes and Line referred to in this agreement in full compliance with the applicable provisions of law, and particularly the Act, and in the most economical and efficient manner, but with due regard to the wage and manning scales and working conditions prescribed by the Owner. The Managing Agent shall exercise due diligence to protect and safeguard the interests of the Owner in all respects, and to avoid loss and damage of every nature to the Owner.

9. *Minimum Manning and Wage Scales and Reasonable Working Conditions.* It is understood and agreed that at all times during the period of this agreement, there shall be strict compliance in the operation of the Line with the minimum manning scales and minimum wage scales and the requirements as to reasonable working conditions now or hereafter adopted by the Owner pursuant to Section 301(a) of the Act and in effect from time to time. The Managing Agent will post and keep posted in a conspicuous place on each vessel operated by it a copy of such minimum manning and wage scales and working conditions then in effect and applicable to such vessel, printed in type satisfactory to the Owner.

10. *Vessel Personnel.* It is understood and agreed that the period of this agreement:

In so far as is practicable, officers' living quarters shall be kept separate and apart from those furnished for members of the crew;

[fol. 35] Licensed officers and unlicensed members of the crew shall be entitled to make complaints or recommendations to the Commission, Coast Guard, or Department of Labor, providing they file such complaint or recommendation with their immediate superior, who shall be required to forward such complaint or recommendation with his remarks to the Commission, Coast Guard, or Department of Labor;

Licensed officers who are members of the Naval Reserve Corps shall wear on their uniforms such special distinguishing insignia as may be approved by the Secretary of the Navy; officers being those men serving under licenses issued by the Bureau of Marine Inspection and Navigation of the Department of Commerce;

The uniform stripes, decoration, or other insignia shall be of gold braid or woven gold or silver material, to be worn by officers, and no member of the ship's crew other than licensed officers shall be allowed to wear any uniform with such officer's identifying insignia;

No discrimination shall be practiced against licensed officers, who are otherwise qualified, because of their failure to qualify as members of the Naval Reserve Corps;

Licensed officers shall take their meals in the main dining salon of the vessel and no other place during regular meal hours, except in cases of emergency.

[fol. 36] 11. *Repairs and Maintenance.* The Managing Agent shall, subject to such regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements. No extraordinary repairs or expenses of any kind shall be made by the Managing Agent except in cases of serious emergency without first securing in writing the authorization of the Owner.

12. *Surveys and Inspections.* The Owner shall have the right at any time without notice to survey any of the vessels operated by the Managing Agent hereunder to satisfy itself that they are being properly maintained, and the Managing Agent shall make, for the account of the Owner, such repairs as may be determined to be necessary. The Managing Agent agrees to comply fully with all instructions of the Owner with respect to the inspection of said vessels and to give such representatives as the Owner may designate from time to time full, free, and complete access at all reasonable times, to all parts of the vessels, and to cooperate with such representatives in the making of any inspection or investigation which the Owner may deem desirable.

13. *Accounting and Reports.*

(a) The Managing Agent and every affiliate, domestic agent, subsidiary, or holding company connected with, or directly or indirectly controlling or controlled by, the Managing Agent (1) shall keep its books, records, and accounts relating to the maintenance, operation, and serv- [fol. 37] icing of the vessel or vessels, services, routes, and Line covered by this agreement in such form and under such regulations as may be prescribed by the Owner, but the Owner shall not require the duplication of books, records, and accounts required to be kept in some other form by the Interstate Commerce Commission; and (2) shall file, upon notice from the Owner, balance sheets, profit and loss statements, and such other statements of financial operations, special reports, memoranda of any facts and transactions, which in the opinion of the Owner affect the financial results in, the performance of, or transactions or operations under, this agreement.

(b) The Owner is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this article whenever it may deem it necessary or desirable, including an analysis of the surplus and all supporting accounts.

(c) Upon the willful failure or willful refusal of any person described in this article to comply with the above provision, the Owner shall have the right to rescind this agreement, and upon such rescission, the Owner shall be relieved of all further liability under this agreement.

14. *Insurance.* The Owner shall provide, without cost or expense to the Managing Agent, hull machinery, and port risk insurance, and the Managing Agent shall provide, for the account of the Owner and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary.

15. *Traffic Contracts.* All traffic contracts shall be for the account of the Owner and all documents such as bills of lading, contracts of affreightment, etc., shall be in accordance with the terms, conditions, and forms prescribed by the Owner.

[fol. 38] 16. *General Average.* In cases of casualty or vessel disability necessitating declaration of general average, the Managing Agent agrees to appoint an average adjuster from an approved list of adjusters furnished by the Owner; to obtain adequate general average security from the cargo, asserting liens for that purpose if necessary; to supply the adjuster with all disbursement accounts, documents and data required in the adjustment of the average; and to take all other necessary measures, including such legal action as may be directed by the Owner for the protection of the interests of all concerned in the general average. For such service, including any other service required of the Managing Agent in general average cases, the Managing Agent shall receive a special fee to be fixed by agreement, in each case, with the Owner, and also, when deemed necessary by the Owner, by agreement with the other interests involved, and the Managing Agent shall claim allowance therefor in general average as a charge of service rendered in the general interest. It is understood and agreed, however, that the Owner shall be liable only for the vessel's proportion of such special fee, as apportioned in the general average adjustment, and that payment of this fee, or any portion of it, shall be contingent on the completion, issuance, and, if desired by the Owner, acceptance and/or settlement of the general average statement by all contributing interests.

17. *Salvage.* Salvage claims for services rendered to vessels other than vessels owned or controlled by the Owner shall be handled by, and be under the control of, the Owner. Salvage awards for services rendered to other vessels

owned or controlled by the Owner, including other vessels of the Line, shall be made by the Owner.

78. *Bond.* Before this agreement becomes operative, the Managing Agent agrees that it will furnish and maintain [fol. 39] during the period of this agreement at its own expense a bond with sufficient corporate surety, in the amount of Eighty Thousand Dollars ($80,000.00), such bond to be approved by the Owner both as to form and sufficiency of surety, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement, including without limitation of the foregoing the condition to faithfully account to the Owner for all funds or property received by the Managing Agent, its subagents, master and other licensed officers of vessels allocated hereunder, and for funds disbursed by its subagents and by the Owner upon approval of the Managing Agent. The Managing Agent may, in lieu of furnishing such bond, pledge U. S. Government securities, $80,000.00 face value, under an agreement satisfactory in form to the Owner.

19. *Payment of Overhead.* The Owner agrees to pay to the Managing Agent the actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement. Payment hereunder shall be made and adjusted as follows:

(a) The Owner shall pay to the Managing Agent within ten (10) days after the conclusion of each calendar month during which voyages may be commenced under this agreement, the sum of Thirteen Thousand, Three Hundred Thirty-three Dollars and Thirty-three Cents ($13,333.33) but such installment shall be reduced by all amounts due to the Managing Agent for overhead and paid in respect of voyages terminated during said month under the Operating Agreement, 1935.

[fol. 40] (b) The Owner shall pay to the Managing Agent within ten (10) days after the conclusion of each calendar month during the term of this agreement in which the commencement of voyages shall not be authorized hereunder, a sum bearing the same ratio to $13,333.33 as the total voyage

days during such month of operation of the Commission's vessels under this agreement bears to the product of twelve times the number of days in such month.

(c) As soon as practicable after the termination of the last voyage hereunder, there shall be a final adjustment and at that time the Owner shall pay to the Managing Agent the excess of actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement over the aggregate of all installments of overhead theretofore paid hereunder. Any excess of such installments over such overhead expense as so determined shall be repaid to the Owner by the Managing Agent.

20. *Salaries and Fees of Directors, etc.* No director, officer, or employee (which term shall be construed in the broadest sense to include, but not to be limited to, managing trustee or other administrative agent), shall receive from the Managing Agent and its affiliate, subsidiary, associate, directly or indirectly, wages, salary, allowances of compensation in any form for personal services which will result in such person's receiving a total compensation for his personal services from such sources exceeding in amount or value Twenty-five Thousand Dollars ($25,000.00) per annum.

[fol. 41] 21. *Employment of Member of Congress.* The Managing Agent agrees not to employ any Member of Congress either with or without compensation, as an attorney, agent, officer, or director of such person.

22. *Sale, Transfer or Assignment.* Without the written consent of the Owner, the Managing Agent shall not sell, assign or transfer either directly or indirectly or through any reorganization, merger or consolidation, this agreement or any interest therein nor shall any agreement or arrangement be made by the Managing Agent whereby the maintenance, management or operation of the aforesaid service, route, line or vessels is to be performed by any other person, whether as Managing Agent or otherwise.

23. *Agents of Managing Agent.* Any agents selected or appointed by the Managing Agent shall be solely the agents

of said Managing Agent and not, in any respect, the agents of the Owner. The Managing Agent shall be responsible to the Owner for any action taken by any of said agents. Such agents shall, however, be subjected to disapproval by the Owner and any agency agreement shall be terminated by the Managing Agent if the Owner shall so request. Any compensation payable by the Managing Agent for services rendered in connection with the Owner's vessels shall be subject to aproval by the Owner.

24. *Foreign-Flag Vessels.* Without the express written consent of the Owner, neither the Managing Agent nor any holding company, subsidiary, affiliate, or associate of the Managing Agent, nor any officer, director, agent, or executive thereof, shall, directly or indirectly, own, charter, act as agent or broker for, or operate any foreign flag vessel which competes with any American flag vessel service which may be determined by the Owner to be essential.

[fol. 42] 25. *Termination upon Default.* The Owner may terminate this agreement by written or telegraphic notice to the Managing Agent in case of the occurrence of any of the following events of default:

(a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or any assignment, transfer, agreement or arrangement whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent, unless the prior written consent of the Owner is obtained.

(b) The filing of a petition in bankruptcy, or for reorganization under Section 77-B of the Bankruptcy Act, by the Managing Agent or the entry of an order, upon petition against the Managing Agent, adjudicating the Managing Agent a bankrupt, or approving the filing of such petition under said Section 77-B, or the appointment of a receiver or receivers of the Managing Agent or any substantial part of its property, or the making of a general assignment by the Managing Agent for the benefit of creditors.

(c) Any breach by the Managing Agent of its obligations under this agreement or any agreement which may be executed in connection herewith.

(d) Failure by the Managing Agent to comply with any applicable provisions of the Merchant Marine Act, 1936, or any law relating to the operation of the foregoing vessels.

26. *Cancellation or Modification by Mutual Consent.* This agreement may be terminated, modified or amended at any time by mutual consent.

[fol. 43] 27. *Liquidation of Business.* In case of termination of this agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the possession or control of the Managing Agent by reason of this agreement, shall be immediately turned over to the Owner, at times and places to be fixed by the Owner, and the Owner may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid, provided, however, the Managing Agent shall, if required by the Owner, adjust, settle and liquidate the current business of the vessels.

Nothwithstanding the foregoing provisions, however, except in the event of default, when the Owner shall otherwise direct, the Managing Agent may complete hereunder voyages commenced prior to the date as of which the agreement shall be termimated.

28. *Determination by Commission.* Any question arising under this agreement shall be referred to the United States Maritime Commission for determination, and its decision shall be final.

In Witness Whereof, the parties hereto have executed this agreement in duplicate the day and year first above written.

United States Maritime Commission, by Joseph P. Kennedy, Chairman. (Seal) Attest: W. C. Peet, Jr., Secretary.

Roosevelt Steamship Company, Inc., by John M. Franklin, Vice President. (Seal) Attest: A. P. Palmer, Secretary.

[fol. 44] In United States District Court

Affidavit of August P. Klein in Opposition to Motion

State of New York,
County of New York, ss:

August P. Klein, being duly sworn, deposes and says:

1. That I am a member of the firm of Klein Kinsley & Klein, attorneys for the plaintiff in the above-entitled

action and that I am fully acquainted with all the steps and proceedings had herein.

2. The present motion, made on the eve of trial, is to dismiss the complaint on the ground that the Court has no jurisdiction of the subject matter of the action. More specifically it is contended that the present suit should have been brought pursuant to the Suits in Admiralty Act, against the United States of America.

3. The action is to recover damages for the wrongful death of the plaintiff's intestate. On July 9th, 1938, plaintiff's intestate, a custom's guard was climbing a ladder thrown over the side of the steamship Unicoi in order to board the ship. The ladder broke, intestate fell and sustained injuries, as a result of which he eventually died. This action was brought against the defendant, Roosevelt Steamship Company, Inc., as the party managing and operating the boat and its appurtenances, the negligence predicated against it is upon the theory that it, its serv-[fol. 45] ants, agents and employees, threw a ladder, which it knew or should have known was defective and dangerous, over the side of the ship for use by the plaintiff's intestate.

4. The defendant as part of its moving papers submits the affidavit of William E. Collins, Counsel to the United States Maritime Commission for the North Atlantic District, and Special Assistant to the United States Attorney for the Southern District of New York. On the last page of the affidavit of Mr. Collins the Court is referred to various cases taken from the files of his office. An examination of these cases indicates that they were all decided in the year 1930.

5. No reference is made and the Court's attention is not called to the very recent case of:

> *Quinn* v. *Southgate Nelson Corporation*, United States District Court, Southern District of New York, Civ. 5-260, decided January 16, 1941,

with an opinion by Moscowitz, D. J., which I believe is on all fours with the present case. I am informed that this case is now on appeal.

6. The agreement under which the Southgate Nelson Corporation was operating was similar to the agreement under

which the present defendant, Roosevelt Steamship Company, Inc., was operating. I take the liberty of quoting from the opinion in the *Quinn* case as follows:

"Under these circumstances, the defendant bases its asserted non-liability upon the contention that the operating agreement and practice thereunder were such as to make [fol. 46] the master of the Waukegan, its officers and crew, the agents of the United States Maritime Commission, a governmental agency, and not of the defendant, Southgate Nelson Corporation. The defendant claims therefore, that any acts of negligence are not to be ascribed to it, but to the United States Maritime Commission.

The operating agreement between the United States Maritime Commission and Southgate Nelson Corporation under which the Waukegan, among other vessels, was operated, designated the latter as managing agent 'to manage, operate, and conduct the business of the Line * * *.' The managing agent was 'to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe. * * *.' Paragraph 7 of the agreement provided in part as follows: 'The licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied.'

It thus appears that actual choice of the ship's personnel was in the hands of the defendant although the owner retained a veto power with respect thereto. Actual operation rested with the defendant although the owner retained the right to issue restrictions. Under such circumstances, it is difficult to see how the defendant can claim complete freedom of responsibility for the acts of the ship's master whom it selected. Granting that the owner reserved a veto power over the actions of the defendant, yet the initial selection of the Waukegan's officers rested with the defendant and immediate supervision rested with it. It was not clothed with the sovereign immunity of the owners since [fol. 47] as is well established, 'the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' See *Keifer & Deifer* v. *R. F. C.*, 306 U. S. 381, 388; see also, *Sloan Shipyards Corp.* v. *United States S. Bd.*

E. F. Corp., 258 U. S. 549, 567, 568. The defendant had the full power to control the actions of the master. With that went responsibility for his acts.

Aside from the foregoing, however, the agreement between the owner and the defendant placed upon the defendant responsibility for the conduct of the agents chosen by it. Thus paragraph 23 of the agreement provided as follows: 'Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner. The Managing Agent shall be responsible to the Owner for any action taken by any of said agents. Such agents shall, however, be subject to disapproval by the Owner and any agency agreement shall be terminated by the Managing Agent if the Owner shall so request. Any compensation payable by the Managing Agent for services rendered in connection with the Owner's vessels shall be subject to approval by the Owner.' It is likewise significant to note in passing, although by no means determinative, that Paragraph 14 of the agreement required the defendant to provide protection and indemnity insurance, which might indicate that the parties themselves viewed the defendant as being the responsible party.

Since the master was the subagent of the defendant, responsibility for the negligent operation of the vessel must rest upon it. As stated in the Restatement of the Law of [fol. 48] Agency, Paragraph 362, 'An agent is liable to third persons for the conduct of subagents and of his servants under the same conditions which make a principal liable for the conduct of an agent or servant.' "

7. In the present case it is conceded that the physical operation and possession of the boat and its appurtenances were at the time of the accident in the defendant. At the bottom of page 2, of the Examination before Trial, a copy of which is annexed to the moving papers, the following testimony appears:

"Q. Did the defendant operate the boat?

A. Yes.

Q. Did the defendant operate the boat on July 9, 1938, and prior thereto?

A. Yes."

8. The contract provided for the operation and control of the boat by the defendant. Paragraph 7, reads in part as follows:

"The Managing Agent (the defendant herein) agrees to man, equip, victual, supply and operate the vessels." • • •

Paragraph 11, reads in part as follows:

"The Managing Agent (the defendant herein) shall, subject to regulations or methods of supervision and inspection as may be required or prescribed by the Owner, exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts, and will effect maintenance and voyage repairs and replacements." • • •

[fol. 49] Paragraph 14, provides in part as follows:

"The Managing Agent (the defendant herein) shall provide, for the account of the Owner and subject to its approval, Protection and Indemnity, and such other forms of insurance as the Owner may deem necessary."

9. By the terms of the contract the defendant was specifically charged with the obligation of properly operating and maintaining the boat and its appurtenances, and therefore it is apparent that both by the terms of the contract and from the physical facts the operation of the boat was in the hands of the defendant.

10. In causing a ladder to be lowered over the side of its boat for the use of the plaintiff's intestate, which ladder, it knew or should have known was defective, the defendant committed an affirmative act of negligence. It is familiar law that a person who commits an act of negligence is personally responsible for the consequences thereof, regardless of whether the act was done on behalf of a principal or whether it was done on behalf of himself. He is an active tort feasor and is liable for his misfeasance. See:

Mollino v. *Ogden & Clarkson Corp.*, 243 N. Y. 450, and cases cited therein;

Mechem Agency, Volume One, Second Edition, Section 1474;

New York and Cuba Mail Steamship Company v. *United States*, 12 Fed. 2nd, 348;
Blumenthal v. *United States*, 30 Fed. 2nd, at page 248;
Sloane's Shipyard's Case, 258 U. S. 549.

[fol. 50] 11. The Suits in Admiralty Act was passed primarily to protect the government and it prohibited the libeling of government owned property. The accepted test on the question of jurisdiction as laid down in the case of *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, is that "Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States." See

Shea v. *Export Steamship Corporation*, 253 N. Y. 17.

In the present case the government is not sued and if we are successful the government will not directly or mediately pay out any money for two reasons:

(a) An employee or agent who commits an affirmative tort cannot collect from his master or principal. See 3 C. J. S. Agency, Section 220.

(b) The management agreement under which the defendant Roosevelt Steamship Company, Inc., was operating, specifically provided for liability insurance, see Paragraph 14, and for an $80,000.00 bond conditional upon the due and faithful performance of all and singular covenants and agreements of the Managing Agent (the defendant herein), contained in the agreement, see Paragraph 18.

12. In connection with the provision for the bond, two of the pertinent paragraphs of the agreement are Section 8, in which it agrees to conduct its operations in full compliance with the applicable provisions of law and to exercise due diligence to protect and safeguard the interests of the Owner in all respects; and Paragraph 11, in which it agrees to exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, cover-[fol. 51] ing hull, machinery, boilers, tackle, apparel, furni-

ture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements.

13. In the case of

Odgaard v. *Cosmopolitan Shipping Co., Inc.*, 171 Misc. 244,

the United States Attorney appeared specially and made a motion to dismiss the complaint. The vessel was operated by the defendant Cosmopolitan Shipping Co., Inc., as agent for the United States. It was named as a defendant together with the America France Line, a trade name owned by the United States. It does not appear that service was ever made upon the government and the Court treated the matter as if there was only one defendant in the case. The defendant claimed that jurisdiction of the action was exclusively in the United States District Court and relied upon the Suits in Admiralty Act. The Court had the following to say at the bottom of page 245, and top of page 246:

"The question presented here is whether that statute is controlling of this action. It appears the purpose of the act is to provide a remedy against the United States for damage done by vessels owned by it which are employed in merchant service. Among the provisions of the act are those for payment of judgments recovered from the Treasury of the United States.

In the instant case plaintiff is seeking neither recovery from the United States nor satisfaction of any judgment obtained out of a vessel owned by the United States or from the cargo of such a vessel. If he were the remedy would be controlled by the Suits in Admiralty Act. (*Fleet Corpora-*
[fol. 52] *tion* v. *Rosenberg Bros.*, 276 U. S. 202). However, the limitation of the act would seem to be only applicable to instances where the money required to pay the judgment against the defendant would come directly or indirectly from the United States Treasury, or in other words where the United States is the real party affected by the action. (*Johnson* v. *Fleet Corporation*, 280 U. S. 320). It does not appear that the liability sought to be placed upon this defendant would be directly or indirectly the liability of the United States. The defendant is sued as the agent responsible for the injury suffered by the plaintiff. While the plaintiff might have elected to include the United States as a defendant, he did not do so, and there does not appear

to be any way in which the defendant sued could make its liability that of the government. Under those circumstances the case differs from no other under the Jones Act, and that being so the plaintiff may sue in the State court if he so desires. (*Panamana R. R. Co.* v. *Vasquez*, 271 U. S. 557, affg. 239 N. Y. 590)."

14. It is therefore respectfully submitted that the motion herein should be denied.

(Signed) August P. Klein.

Sworn to before me this 6th day of May, 1941. Earle E. Lightbourne, Commissioner of Deeds, New York City.

[fol. 53] In United States District Court

Appearances:

Klein, Kinsley & Klein, Esqs., Attorneys for Plaintiff; August P. Klein, Esq., of Counsel.

Kirlin, Campbell, Hickox, Keating & McGrann, Esqs., Attorneys for Defendant; Raymond Parmer, Esq., of Counsel.

Opinion on Motion to Dismiss—May 21, 1941

Mandelbaum, D. J.:

The defendant moves to dismiss the complaint for lack of jurisdiction over the subject matter of the action.

The plaintiff, as administratrix of the deceased claims that his death was caused by a defective ladder and accordingly charges the defendant with negligence.

The defendant says that the United States of America is the real party in interest; that it owns and controls the vessel, pursuant to an operating agreement between the Maritime Commission and Roosevelt Steamship Company, Inc.; that the United States of America must ultimately pay the judgment if there be a recovery.

It is therefore the defendant's position that the action is improperly brought since a remedy to the plaintiff is available under the Suit in Admiralty Act. In opposing the motion, plaintiff relies chiefly on the case of *Quinn* v. *South-*

[fol. 54] *gate Nelson Corp.*, decided by Judge Moscowitz, sitting in this district on January 16th, 1941, Civ. 5-260. A claim similar to the one now raised by the defendant was rejected by the court. I have been advised that an appeal from that decision is now pending in the Circuit Court of Appeals. While the question is not free from doubt, I shall presently follow the decision in the *Quinn* case and sustain jurisdiction. I recommend that it is for the best interests of both parties that the trial be adjourned until the appeal of the *Quinn* case is decided. I can see no prejudice to any one. Should the question at issue be decided adversely to the plaintiff, the defendant may then move for reargument, or such other relief as may be advisable.

Samuel Mandelbaum, U. S. D. J.

Dated, May 21st, 1941.

[fol. 55] In United States District Court

Notice of Motion for Reargument of Motion to Dismiss

Sirs:

Please Take Notice that upon the annexed affidavit of Raymond Parmer, sworn to June 6, 1941, the undersigned will move this Court in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 17th day of June, 1941, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for the reargument of its motion to dismiss the complaint made on the ground that the Court has not jurisdiction of the subject matter of the action, which was heretofore brought on by notice of motion dated April 29, 1941, and for such other and further relief as is just in the premises.

Dated, New York, June 9, 1941.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and Post Office Address: 120 Broadway, Borough of Manhattan, City of New York.

To: Klein, Kinsley & Klein, Esqs., Attorneys for Plaintiff, 342 Madison Avenue, New York, N. Y.

[fol. 56] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RAYMOND PARMER IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss.:

Raymond Parmer, being duly sworn, says:

I am an attorney at law and a member of the firm of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for the defendant, and I am familiar with the pleadings and proceedings heretofore had herein.

Defendant, Roosevelt Steamship Company, Inc., now moves for a reargument of its motion to dismiss this action on the ground that the court has not jurisdiction of the subject matter thereof.

The motion to dismiss on the above ground came on before Judge Mandelbaum on May 1, 1941, and was denied by him in an opinion dated May 21, 1941, a copy of which is annexed hereto.

The reason for moving to reargue is that it is believed that the court has overlooked an important matter, and that this matter should be called to the court's attention more pointedly than was done on the original argument.

Apparently the sole reason for denying the motion was a reliance by the court on the case of *Quinn* v. *Southgate Nelson Corporation*, decided by Judge Moscowitz, sitting in the Southern District, on January 16, 1941.

If the *Quinn* case involved the same point as is involved in the case at bar, there would be no prejudice, as Judge [fol. 57] Mandelbaum points out, in awaiting the decision of the Circuit Court of Appeals, on the appeal from Judge Moscowitz's decision in the *Quinn* case. If that were the case, the defendant, Roosevelt Steamship Company, Inc., would be content to wait, and would not now be making this motion to reargue.

However, the *Quinn* case does not involve the point which Roosevelt Steamship Company, Inc. has raised on this motion, and because of that it is apparent that the decision of the Circuit Court of Appeals will not dispose of the question raised in the present motion.

The *Quinn* case does involve a point which is available to Roosevelt Steamship Company, Inc. in the present case. But that point was not raised by the Roosevelt Steamship

Company, Inc. on the present motion. The only point raised by Roosevelt Steamship Company, Inc. was a point with respect to jurisdiction of the subject matter. In the *Quinn* case that point was not raised. It could not be raised because the tort was one occurring on land.

Defendant, Roosevelt Steamship Company, Inc., has two legal points on which it may defend. The first is that as an agent of the United States it did not own, operate nor control the vessel on which the accident occurred, and did not employ the crew. That is a point which can be raised properly on a trial. It is an issue in the case, having been raised by complaint and answer. The decision of Judge Moscowitz in the *Quinn* case, if correct, decides that point against the contention of the defendant, Roosevelt Steamship Company, Inc. In view of the fact that the question will eventually be decided by the Circuit Court of Appeals, there is no disposition on the part of the defendant herein to insist on a decision in the District Court contrary to that in the *Quinn* case. Indeed, the defendant, Roosevelt Steamship Company, Inc., has not raised this question in the [fol. 58] District Court as yet. It intended to reserve it for the trial or for such time as the Circuit Court of Appeals would have decided it.

The point which the defendant herein has raised before this court is one having to do with jurisdiction. For the purpose of this motion it may be assumed that the defendant, Roosevelt Steamship Company, Inc., operated and controlled the vessel on which the accident happened and employed the crew, and that because of this it may be held liable to the plaintiff for negligence.

Nevertheless, it appears, without contradiction, that the money with which to pay any judgment which may be rendered herein will come from the United States Treasury. Therefore, under the law, the plaintiff is required to bring his suit against the United States of America under the Suits in Admiralty Act. In other words, the United States of America makes itself *suable and liable*, and requires that it be substituted as defendant for the "real defendant," and that the suit be brought in Admiralty.

The Suits in Admiralty Act does not provide merely that suits for marine "torts" when *committed by the United States* must be brought in Admiralty. It provides that suits for marine torts where the United States must eventually pay the bill, even though it did not commit the tort,

must be brought in Admiralty; and then against the United States as if the United States were the tort feasor.

The Supreme Court, in the case of *Johnson* v. *United States Shipping Board* and *United States Shipping Board* v. *Lustgarten*, 280 U. S. 320, at pages 326 and 327, makes all of the above clear.

At page 327 the court said:

"The analysis of the Act and the reasons on which rests our decision in *Fleet Corporation* v. *Rosenberg Bros.* apply here. Putting the United States and the Fleet Corpora- [fol. 59] tion on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act. Such a failure of purpose on the part of the Congress is not readily to be inferred. We conclude that the remedies given by the Act are exclusive in all cases where a libel might be filed under it."

It is to be noted that the Supreme Court specifically referred to suits against "other agents" of the United States. The case before it was one in which there was involved a private corporation which had been acting as an agent for the United States. For the purposes of its decision it was assumed that the agent might be liable, and for that reason it was held that the suit must be brought against the United States in Admiralty.

Obviously, if the agent could not be liable (because it did not control the vessel and did not employ the men) no judgment could be obtained against it and no funds to pay it would come from the United States Treasury. However, because the court assumed that the agent, notwithstanding its agency, might still be liable, it dismissed the action on jurisdictional grounds. The core of the decision was that in such cases the United States has consented to be sued on certain terms as a complete substitute for suits against it or its agent in other courts and on other terms.

Therefore, if the Circuit Court of Appeals should hold in the *Quinn* case that the contract between the United States and its agents leaves the agents in control, makes the agents

the employers of the crews, and therefore makes the agents [fol. 60] legally responsible for personal injuries occurring to persons coming on board Government vessels, there would still be the question which the defendant here has endeavored to raise by motion to dismiss. The decision of the Circuit Court of Appeals would not determine the question which the present defendant has raised. On the other hand, it would make it more pointed, for then the question would be whether the liability, if any, of the agent of the United States should be determined at law or in Admiralty by a suit against the United States under the Suits in Admiralty Act. There really is no question with regard to this. It has already been determined by the Supreme Court in favor of the defendant.

Already the defendant has offered the highest form of proof that the money to pay any judgment rendered against the defendant will come eventually from the United States Treasury. A representative of the United States says so.

The Circuit Court of Appeals for this circuit has said the same thing in *Admiral Oriental Lines* v. *United States*, 86 F. (2d) 201.

If the court needs further evidence of the obligation of the United States to pay such a judgment and its recognition of its obligation, it can and will be submitted. However, in view of the present failure on the part of the plaintiff to contradict the statements already made, the present showing should be sufficient.

By reason of the above, the defendant asks for a rehearing and on the rehearing the granting of the motion to dismiss on account of the absence of jurisdiction of the subject matter. It does this primarily because it wishes to call the court's attention to the fact that the decision of the Circuit Court of Appeals in the *Quinn* case will not necessarily be determinative of the motion made herein, and be- [fol. 61] cause it would not be proper to have this present motion, which relates to jurisdiction, depend on the *Quinn* case, in which the sole matter involved is that of the control and operation of a Government vessel.

Of course, if the Circuit Court of Appeals should hold that the private corporations acting as agents for the United States in the operation of Government vessels do not employ the crews, do not control and operate the vessels and are not responsible for torts, then there will not be any necessity for deciding the present motion relating to

jurisdiction. The defendant will not be liable in the first place, and cannot be held liable in any court. Under such circumstances it will not be necessary to decide that the defendant's liability must be ascertained by proceedings in a particular court.

On the other hand, if the Circuit Court of Appeals should hold that such Government agents are liable for such torts, then the present question—relating to jurisdiction—is presented pointedly for decision. There is no reason why it cannot be decided in advance of the Circuit Court of Appeals' decision, by assuming that the decision of the Circuit Court of Appeals will be contrary to the contentions of the defendant in the *Quinn* case and the defendant herein.

Raymond Parmer.

Sworn to before me this 6th day of June, 1941. Andrew J. Doyle, Notary Public, Queens County.

[fol. 62] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF AUGUST P. KLEIN IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York, ss:

AUGUST P. KLEIN, being duly sworn, deposes and says:

1. That I am a member of the firm of Klein, Kinsley & Klein, the attorneys for the plaintiff in the above-entitled action and that I am fully acquainted with all the steps and proceedings had herein.

2. The present motion is a motion by the defendant for a reargument on the ground that the defendant believes that the Court overlooked an important matter, in that the case of *Quinn* v. *Southgate Nelson Corp.*, decided by Judge Moscowitz, sitting in this district on January 16th, 1941, Civ.-5-260, cited by the Court, is not in point and does not cover the issue raised concerning the jurisdiction of the subject matter.

3. This is not true, for the case is on all fours with the present case. Robert Clyde Quinn, like the deceased, James P. Brady, in the present case, was an employee of the United States government. At the bottom of page 3, and

top of page 4, of the Brief for Plaintiff-Appellee, in the *Quinn* case, the following appears:

[fol. 63] "As her husband had been a civil employee of the United States, all rights which the widow of Quinn might have against the owner of the vessel, the United States, would be under the Federal Employees' Compensation Act, and that is why no action for indemnity was brought against the United States. It was not legally possible to maintain such an action.

However, the Southgate Nelson Corporation, a private corporation, as an independent contractor and managing agent, being in actual possession and charge of the vessel, and the officers thereof being subject to its control and direction, was liable for its own negligent acts and, consequently, the widow of Robert Clyde Quinn brought a civil action for damages against the Southgate Nelson Corporation.

The fact that the salaries of the ship's officers may have been paid by the United States, or that the United States, through the Maritime Commission, reserved supervision not only over the ship's officers, but also over the shipping routes, would in no way change the legal liability of the agent for its own negligence, or for the negligence of the ship's officers, under its control.

Even though the United States of America may be immune from suits, nevertheless such immunity is not inherited by a private corporation serving as agent of the Government in the prosecution of a commercial enterprise in which the Government may be engaged.

Kiefer & Kiefer v. *Reconstruction Finance Corporation*, 306 U. S. 381."

4. The Defendant-Appellant in its Brief in the *Quinn* case, at page 23, has the following to say:

[fol. 64] "The responsibility of the United States for damages caused by the negligence of officers and crews of vessels operated for its account is recognized in the Suits in Admiralty Act, 46 U. S. Code (annot.) 741, 752. In *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, 326, 74 L. Ed. 451, 457, the Supreme Court dealt with a number of cases involving claims arising out of the operation of Shipping Board vessels. Both cargo and personal injury claims were involved.

The Court held that the remedy provided by the Suits in Admiralty Act was exclusive as against the United States, the Fleet Corporation and the Managing Operators saying:

'On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States. It is the real party affected in all of these actions.' "

5. In answer to that argument the Plaintiff-Appellee, on page 13, of its Brief in the *Quinn* case replied as follows:

"The suggestion by appellant that the Suits in Admiralty Act is applicable to this case is utterly without foundation. The decedent, Robert Clyde Quinn, was a civil employee of the United States, and the exclusive remedy is under the United States Employees' Compensation Act. We sued a third party at common law, for its own negligence, and [fol. 65] any recovery had against such third party will not be paid by the United States, but would be paid by the insurance company which issued the liability policy covering this vessel."

6. In my answering affidavit to the original motion to dismiss, I answered the contentions of the defendant as follows:

The Suits in Admiralty Act was passed primarily to protect the government and it prohibited the libeling of government owned property. The accepted test on the question of jurisdiction as laid down in the case of *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, is that "Directly or mediately, the money required to pay a judgment against any of the defendants in these cases would come out of the United States." See

Shea v. *Export Steamship Corporation*, 253 N. Y. 17.

In the present case the government is not sued and if we are successful the government will not directly or mediately pay out any money for two reasons:

(a) An employee or agent who commits an affirmative tort cannot collect from his master or principal. See 3 C. J. S. Agency, Section 220.

(b) The management agreement under which the defendant Roosevelt Steamship Company, Inc., was operating, specifically provided for liability insurance, see Paragraph 14, and for an $80,000.00 bond conditional upon the due and faithful performance of all and singular covenants [fol. 66] and agreements of the Managing Agent (the defendant herein), contained in the agreement, see Paragraph 18.

In connection with the provision for the bond, two of the pertinent paragraphs of the agreement are Section 8, in which it agrees to conduct its operations in full compliance with the applicable provisions of law and to exercise due diligence to protect and safeguard the interests of the Owner in all respects; and Paragraph 11, in which it agrees to exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and will effect maintenance and voyage repairs and replacements.

In the case of *Odgaard* v. *Cosmopolitan Shipping Co., Inc.*, 171 Misc. 244, the United States Attorney appeared specially and made a motion to dismiss the complaint. The vessel was operated by the defendant Cosmopolitan Shipping Co., Inc., as agent for the United States. It was named as a defendant together with the America France Line, a trade name owned by the United States. It does not appear that service was ever made upon the government and the Court treated the matter as if there was only one defendant in the case. The defendant claimed that jurisdiction of the action was exclusively in the United States District Court and relied upon the Suits in Admiralty Act. The Court had the following to say at the bottom of page 245, and top of page 246:

"The question presented here is whether that statute is controlling of this action. It appears the purpose of the [fol. 67] act is to provide a remedy against the United States for damage done by vessels owned by it which are employed in merchant service. Among the provisions of the act are those for payment of judgments recovered from the Treasury of the United States.

In the instant case plaintiff is seeking neither recovery from the United States nor satisfaction of any judgment

obtained out of a vessel owned by the United States or from the cargo of such a vessel. If he were the remedy would be controlled by the Suits in Admiralty Act. (*Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.) However, the limitation of the act would seem to be only applicable to instances where the money required to pay the judgment against the defendant would come directly or indirectly from the United States Treasury, or in other words where the United States is the real party affected by the action. (*Johnson* v. *Fleet Corporation*, 280 U. S. 320.) It does not appear that the liability sought to be placed upon this defendant would be directly or indirectly the liability of the United States. The defendant is sued as the agent responsible for the injury suffered by the plaintiff. While the plaintiff might have elected to include the United States as a defendant, he did not do so, and there does not appear to be any way in which the defendant sued could make its liability that of the government. Under those circumstances the case differs from no other under the Jones Act, and that being so the plaintiff may sue in the State court if he so desires. (*Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557, affg. 239 N. Y. 590.")

7. Incidentally the appeal in the *Quinn* v. *Southgate Nelson Corporation* case, was argued on June 12th, 1941, and [fol. 68] a decision, which no doubt will dispose of the issue now raised, should be forthcoming in very short order.

Wherefore, I respectfully request that the defendant's motion for a reargument be denied.

August P. Klein.

Sworn to before me this 16th day of June, 1941.
Earle R. Lightbourne, Commissioner of Deeds, New York City.

In United States District Court

Present: Hon. Samuel Mandelbaum, U. S. D. J.

Order Denying Motion for Reargument—July 3, 1941

The defendant having moved upon a Notice of Motion, dated June 9th, 1941, for a reargument of its motion to dismiss the complaint made on the ground that the Court

has not jurisdiction of the subject matter of the action, and the said motion duly coming on to be heard on the 17th day of June, 1941,

[fol. 69] Now, upon reading and filing the said Notice of Motion, dated June 9th, 1941, the affidavit of Raymond Parmer, duly sworn to June 6th, 1941, and the opinion of Hon. Samuel Mandelbaum, U. S. D. J., dated May 21st, 1941, all of which were read and submitted by the defendant in support of said motion, and on reading and filing the affidavit of August P. Klein, duly sworn to June 16th, 1941, which was read and submitted by the plaintiff in opposition thereto, and after hearing Raymond Parmer, Esq., of counsel for the defendant in support of said motion, and August P. Klein, Esq., of counsel for the plaintiff in opposition thereto, due deliberation having been had, it is on motion of Klein, Kinsley & Klein, attorneys for the plaintiff,

Ordered, that the said motion for a reargument be and the same hereby is in all respects denied.

Samuel Mandelbaum, U. S. D. J.

July 3, 1941.

In United States District Court.

Present: Hon. Samuel Mandelbaum, U. S. D. J.

Order Denying Motion to Dismiss Complaint—July 3, 1941

The defendant having moved upon a Notice of Motion, dated April 29th, 1941, for an order dismissing the com- [fol. 70] plaint herein, on the ground that the court has not jurisdiction of the subject matter of the action, and the said motion duly coming on to be heard on the 6th day of May, 1941,

Now, upon reading and filing the said Notice of Motion, dated April 29th, 1941, the affidavit of Raymond Parmer, duly sworn to April 30th, 1941, the affidavit of William E. Collins, duly sworn to May 1st, 1941, the examination of Andrew F. Finch, sworn to October 8th, 1940, and on the written contract made between the defendant and the United States Maritime Commission on June 28th, 1937, all of which were read and submitted by the defendant in support of said motion, and on reading and filing the affidavit of August P. Klein, duly sworn to May 6th, 1941, which was

read and submitted by the plaintiff in opposition thereto, and after hearing Raymond Parmer, Esq., of counsel for the defendant in support of said motion, and August P. Klein, Esq., of counsel for the plaintiff in opposition thereto, due deliberation having been had, and upon reading and filing the opinion of the Court, dated May 21st, 1941, it is on motion of Klein, Kinsley & Klein, attorneys for the plaintiff,

Ordered, that the said motion be and the same hereby is in all respects denied.

Samuel Mandelbaum, U. S. D. J.

July 3, 1941.

[fol. 71] In United States District Court

Statement of Evidence.

Before Hon. Alfred C. Coxe, District Judge, and a Jury

New York, October 20, 1941;
10:30 o'clock, a. m.

Appearances:

Klein, Kinsley & Klein, Esqrs., Attorneys for the Plaintiff; Harry A. Gair, Esq., of Counsel.

Kirlin, Campbell, Hickox, Keating & McGrann, Esqrs., Attorneys for the Defendant; Raymond Parmer, Esq., of Counsel.

Mr. Parmer: Your Honor, I think it is fitting that I should mention at this time that one of the points in the case which I shall raise when your Honor thinks it is proper to raise it is the matter of the jurisdiction of the Court—jurisdiction of the subject matter.

The Court: I will be guided by the Circuit Court of Appeals.

(A jury was duly impaneled, examined and sworn.)

(Mr. Gair opened to the jury on behalf of plaintiff.)

(Mr. Parmer opened to the jury on behalf of defendant.)

[fol. 72] Mr. Gair: I offer in evidence the letters of administration issued to Mrs. Brady, plaintiff in this case.

Mr. Parmer: No objection.

(Marked Plaintiff's Exhibit 1.)

Mr. Gair: I am going to read part of the examination before trial. I am not going to read all, but I will read such of it as I deem material to the plaintiff's case, and I think you may want to follow it and see what portion you want to read yourself. I have a photostatic copy of the contract; have you the original?

Mr. Parmer: No, but I will consent to a photostatic copy. However, in order to preserve the continuity of the examination, I would want to read all testimony that you don't read.

Mr. Gair: I think I will read straight down to a certain point, and the rest I will leave entirely to your side.

Mr. Parmer: Very good.

Mr. Gair: May I state to the jury just what I am doing now. I am reading now from a deposition taken in advance of trial of one of the officers of Roosevelt Steamship Company, deposition of Andrew F. Finch, assistant comptroller of the defendant Roosevelt Steamship Company, pursuant to oral stipulation, returnable and held on September 17, 1940, at 11 a. m., at the office of Kirlin, Campbell, Hickox, Keating & McGrann, 120 Broadway, New York City. Appearances: Charles Kramer, of counsel for plaintiff, Raymond Parmer, of counsel for the defendant, and Andrew F. Finch in person.

DEPOSITION OF ANDREW F. FINCH

"Q. Mr. Finch, what is your full name?

"A. Andrew F. Finch.

"Q. Where do you reside?

"A. 721 49th Street, Brooklyn, New York.

"Q. In what capacity are you connected with the defendant?

"A. Assistant Comptroller.

[fol. 73] "Q. For how many years have you been the assistant comptroller?

"A. Since 1936; prior to that time, from 1925 to 1936, treasurer.

"Q. As assistant comptroller, generally what are your duties?

"A. To do with all the financial matters connected with the firm.

"Q. Are you familiar with the steamship Unicoi?

"A. Yes.

"Q. What type of a ship was it?

"A. It was a motor ship, freight carrying vessel.

"Q. Approximately how many tons was it, do you know?

"A. Around 9,000 tons dead weight. 9,000 deadweight tons.

"Q. Do you know how long the boat was?

"A. About 400 feet, I should say.

"Q. What type of cargo did it carry?

"A. Various types; general cargo, all types.

"Q. Was it an ocean-going boat?

"A. Yes.

"Q. Did it carry passengers?

"A. The Unicoi, I believe, had accommodations for 12 passengers.

"Q. On or about July 9, 1938, the day of the accident to James P. Brady, how large was its crew?

"A. The crew was 35 to 36 in number at all times.

"Q. That includes the captain and all the sailors and seamen?

"A. Yes.

"Q. Did the boat have any particular points where it would travel to and from?

"A. Yes; it was scheduled to North Atlantic ports, proceeding to ports in India and return to United States ports.

"Q. Who owned the boat?

"A. The United States Maritime Commission.

"Q. What year did the United States Maritime Commission own the boat?

"A. I don't know exactly what year.

"Q. Approximately.

"A. Around 1920.

"Q. Who owned the boat before?

"A. I don't know.

[fol. 74] "Q. Was that the year the boat was built?

"A. I am pretty sure it was around that time the boat was built.

"Q. Did the defendant operate the boat?

"A. Yes.

"Q. Did the defendant operate the boat on July 9, 1938, and prior thereto?

"A. Yes.

"Q. Was a contract entered into between the United States Maritime Commission and the defendant with reference to the operation of the boat?

"A. Yes.

"Q. Is that a written contract?

"A. Yes."

Mr. Gair: I offer in evidence the contract referred to in the examination.

(Marked Plaintiff's Exhibit 2.)

Mr. Gair: That is all I will read from the examination before trial. Do you want to read anything further from the examination?

Mr. Parmer: I am just looking now. I will continue:

"Q. How long does this contract run?

"A. It was for six months originally, and had been extended from time to time.

"Q. And was the contract in operation on July 9, 1938?

"A. Yes."

And then we will skip down to the bottom of the next page:

"Q. Did the defendant hire the captain of the steamship Unicoi?

"A. The captain was recommended to the Maritime Commission by the defendant.

"Q. Was he accepted?

"A. Yes."

Then the top of the next page:

"Q. Did the defendant also hire the other officers of the steamship Unicoi on or prior to July 9, 1938?

"A. The other officers of the Unicoi were also recommended to the Maritime Commission for approval.

"Q. And were they approved?

"A. Yes.

[fol. 75] "Q. How long had Captain Dixon been the captain of the steamship Unicoi prior to July 9, 1938?

"A. I cannot state offhand, without looking up the record.

"Q. Did the defendant hire the rest of the crew aside from the officers of the steamship Unicoi on or prior to July 9, 1938?

"A. No.

"Q. Did they recommend the employees?

"A. No.

"Q. Who hired them?

"A. The Maritime Commission.

"Q. Did the defendant approve the selection by the Maritime Commission of the crew?

"A. We had nothing to say in the matter."

Mr. Parmer: That is all.

Mr. Gair: I will just read one section of the contract, Section 11, the section about repairs and maintenance (reading to jury).

MARGARET M. BRADY, the plaintiff, called as a witness in her own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Gair:

Q. Mrs. Brady, you were the wife of James Brady at the time of his death?

A. Yes.

Q. Where did you live at that time?

A. Yonkers; 41 Devoe Avenue, Yonkers.

Q. Who was the family—whom did the family consist of at that time besides yourself and husband?

A. My daughter and my son.

Q. Will you give us the daughter's name, please?

A. Virginia Brady.

Q. And how old was Virginia at that time?

A. 15.

Q. And what was she doing?

A. Going to school.

[fol. 76] Q. Will you give us the name of the school, please, and what class she was in?

A. Seton Academy.

Q. That is in Yonkers, is it not?

A. Yonkers.

Q. What is that, a grammar school or a high school?

A. Yes.

Q. High school?

A. It was then junior high.

Q. Do you know what class she was in at that time, what grade she was in?

A. The 8th or 9th—8th, I think.

Q. Who was the other child?

A. My son James.

Q. He was older?

A. Older; he was 20.

Q. And what was he doing at that time?

A. He was at Fordham College.

Q. And what class was he in, do you remember?

A. Second year.

Q. That would be the sophomore year?

A. Sophomore.

Q. And for how long had you been married to Mr. Brady?

A. 23 years.

Q. What was his age at the time that he died?

A. 62 years.

Q. What was your age at that time?

A. 58.

The Court: You say he was what, 62?

Mr. Gair: Your husband's age, his Honor has asked.

The Witness: 57; I am 60 now.

The Court: How old was he on July 9, 1938, did you say 62?

The Witness: 62.

The Court: 62?

The Witness: Yes, sir.

Q. And what was his employment at that time?

A. He was a Customs inspector.

Q. And for how long had he been a Customs inspector?

A. 38 years.

[fol. 77] Q. Do you remember where he was assigned in the period before July 9, 1938?

A. That I don't know, no.

Q. And was he working steadily up to the time of this accident?

A. Steadily for 38 years.

Q. Did you live in your home at the time, or were you living in an apartment house?

A. My own home.

Q. Do you know how much your husband was earning at that time?

A. $2,900 a year.

Q. And did he follow a certain routine so far as giving you money for the table was concerned? Did he give you certain money, each week?

A. $25 a week.

Q. Because of the food for the table. In addition to that, any other expense that was required, such as providing clothing——

A. He paid all the other expenses.

Q. Clothing for yourself?

A. He paid that.

Q. The children stayed at home, did they not, at that time?

A. Stayed home.

Q. The children are still living with you?

A. Yes.

Q. And did he pay, up to the time of his death, all of the expenses of the children?

A. Everything.

Q. Did he have a car?

A. Yes.

Q. And on vacations did he go with you to various places?

A. We would go to Canada.

Q. Take the period of approximately ten years before the accident, what was the condition of his health, so far as you could observe it?

A. Good.

Q. In that period of approximately ten years had he been confined to bed during that time for any ailments, so far as you can remember?

A. The past ten years, do you mean?

Q. Yes.

A. Never.

Q. Had he complained of any pain to the area of his stomach or abdomen?

A. Never.

Q. So far as you know, had any doctor visited him at his home for the purpose of treating him for any complaints so far as the abdomen is concerned?

A. Never.

[fol. 78] Q. What is the first thing you knew about the fact that an accident had happened? When was the first you knew about the accident?

A. When he rang the bell I answered the door.

Q. You mean that Saturday, July 9th?

A. That Saturday he was hurt.

Q. Do you remember about what time it was that he came home?

A. I would say it was between 3 and 4 o'clock.

Q. Don't tell us what he said, because that you are not permitted to do, but tell this: after he got home did you notice anything about him and say what he did?

A. Excessively pale and weak.

Q. Was he holding any part of his body?

A. Yes, he was holding his side as he went to the telephone.

Q. As you are sitting in the box there you are holding your hand to the lower part of your right side?

A. Yes, sir.

Q. Had you ever noticed any such action on his part before that time?

A. No, sir, never.

Q. Will you answer this just yes or no: did he have a talk with you about something having happened, without telling us what it was. Did he tell you? Yes or no.

A. I said "What is the matter?"

Q. And did he answer you?

A. He answered, yes. "I met with an accident."

Q. You are not allowed to say that. That is why I am interrupting you. You are not allowed to say what he told you.

The Court: Well, nobody has objected to it, so what is the difference.

Q. Well, when you spoke to him what happened?

A. He said, "I met with an accident on a ship."

Q. And then what happened?

A. He went to the phone and called his doctor and brother.

[fol. 79] Q. And was his car home at the time?

A. His own car wasn't home at the time; his brother came for him.

Q. Did he have a car at that time himself?

A. Yes, he did, but my son was away in it to school.

Q. So he called his brother?

A. His oldest brother came for him.

Q. And where did they take him?

A. To the doctor's office.

Q. Give us the name of the doctor, please.
A. Dr. Lopez.
Q. And is Dr. Lopez located in Yonkers?
A. He lives in Yonkers, yes.
Q. Did you go along, Mrs. Brady?
A. I went with him.
Q. So you and the brother went with your husband to the doctor's office, and after the doctor examined him where did he go?
A. He sent him home, made him come home and be put to bed.
Q. And was he put to bed when he got home?
A. Put to bed for a week.
Q. From the time that he was put to bed on that Saturday after the accident, when did he leave his bed?
A. Never.
Q. Was he taken from your home?
A. Taken from his bed to the hospital.
Q. And you say that that happened—how long after that was he taken from his bed to the hospital? How long after? When was he taken from your home?
A. Taken to the hospital?
Q. Yes.
A. Between 3 and 4.
Q. I mean on what day of the week?
A. Saturday, the day he was injured.
Q. Saturday he was injured and he was put to bed. How long after that did he go to the hospital?
A. To the hospital he went the following Saturday at about 11 o'clock in the morning.
[fol. 80] Had he been in bed up to that time?
A. All week.
Q. What was being done for him?
A. We applied an ice pack to his side.
Q. Had Dr. Lopez seen him at the house in that week's time?
A. Twice.
Q. Can you tell us, please, when the first time was after the first visit on Saturday?
A. On Monday.
Q. Monday?
A. Yes.
Q. And when did he see him again after that?
A. On Saturday morning.

Q. During that time that the doctor was treating him——
A. Was in constant touch.
Q. Did you keep in touch with the doctor?
A. In constant touch.
Q. By telephone?
A. By telephone.
Q. Did your husband leave his bed for the purpose even of going about the house? Did he leave the bed at all for any purpose during that time?
A. No purpose at all.
Q. And after he got to the hospital that Saturday, to your knowledge was he operated on on that day?
A. I was with him all day.
Q. Was he operated on that day?
A. Operated on at 8 o'clock that evening.
Q. When did he die?
A. Tuesday morning at 2:30.
Q. Can you tell us how tall a man your husband was?
A. I would say 5 feet 8.
Q. And generally, approximately how much did he weigh?
A. About 145.
Q. And did you pay the funeral bill, Mrs. Brady?
A. Yes.

Mr. Gair: We can probably agree on the amount later, Mr. Parmer; we will get together.
Mr. Parmer: Yes.
Mr. Gair: That is all.

[fol. 81] Cross-examination.

By Mr. Parmer:

Q. I don't think I heard you correctly, Mrs. Brady. Did you say that your husband went to Dr. Lopez on the day that he had his accident?
A. Yes, sir.
Q. He went to the doctor's office that day?
A. Went to the doctor's office.
Q. And how long was he gone before he came back from the doctor's office?
A. Before he came back to the house?
Q. Yes.
A. 7:30—between 7 and 8.
Q. And he went to the doctor's office at what time?

A. He went to the doctor's office between 3 and 4. He wasn't there at that time. They said "You can't see him until his office hours," and his brother brought him home to his residence and we went over at 7:30.

Q. And when he returned to the house he went to bed?

A. Put to bed.

Q. And the doctor came to your house on Monday to see him?

A. Monday morning.

Mr. Parmer: That is all.

Mr. Gair: We have a short concession, if your Honor please, with respect to a witness whom Mr. Parmer mentioned while opening, Harry Cohn.

It is conceded that if Harry Cohn were called to testify he would testify that he was deputy surveyor in charge of District No. 4 and would testify that Inspector Brady came to District 4 on October 3, 1926, that he was exceptionally alert for his years and kept up with the more arduous duties of the position of inspector, as capably as men much younger than himself, and that up to the time of the accident he could not recall Mr. Brady's ever complaining of any trouble with his appendix.

[fol. 82] JOSEPH G. DANKELMAN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Gair:

Q. Mr. Dankelman, what is your line of business, please?

A. I am employed by the company as a cooper; in other words, a carpenter repairman. I repair all the freight that is broke, inward and outward.

Q. When you say employed by the company, which company?

A. United States Lines.

Q. United States Lines?

A. Yes, sir.

Q. Are they connected in any way, so far as you know, with the——

Mr. Parmer: I object to that, unless——

Mr. Gair: I withdraw the question for the time.

Q. How long have you been employed by the United States Lines?

A. Since 1930.

Q. Well, in connection with your work as a cooper for the United States Lines, were you at Pier 58 North River on July 9, 1938?

A. I was.

Q. Specifically what were your duties on the pier at or about the time that this accident happened to Inspector Brady?

A. We were waiting for the baggage to be taken off the ship to examine it. We have to open up the baggage for the Customs inspectors to see that it is O.K. to be entered into the country.

Q. And did you know Inspector Brady?

A. I did.

Q. And for how many years had you seen him in the course of his duties and in the course of your own?

A. I have seen him there for about eight years.

Q. On this morning did you see the steamship Unicoi when it came into the dock?

A. I did; yes, sir.

[fol. 83] Q. Can you tell us just what the position of the boat was, so far as the dock was concerned; when the accident happened was it tied up, or what?

A. They were making her fast. She was not fast; they were making her fast.

Q. So far as the gangplank is concerned, at the time this accident happened was the gangplank down?

A. The gangplank was not down; they were working on her to put it down.

Q. Did you have occasion to observe, before the accident happened, anything done with respect to a certain ladder being placed over the side of the boat?

A. Yes.

Q. Did you see the ladder at some time?

A. I did; Yes, sir.

Q. When you first saw the ladder in what position was it?

A. Well, they had a sling on it, lowering it over the side. They were putting it over the side from the top deck.

Q. In some manner?

A. That is it.

Q. Putting it over the side; and then did you see how it was finally put into position?

A. It was put on the lower deck to the bulwark plate on top; it rested on the top plate.

Q. Some of those words I don't understand.

A. That is the last plate on the ship; that is what they call the bulwark plate.

Q. However, the foot of the ladder, where was that resting?

A. On the lower deck.

Q. Off the top of the ladder, was that up against any part of any deck any way?

A. Yes, that was up against the top plate there.

Q. By the top plate—in any event that is—would that be at the place where the rail would be when you go on to the ship?

A. Yes, sir.

Q. How was it kept in position there, if you remember? Was it lashed there?

A. I didn't see no lashing.

[fol. 84] Q. Did you see anybody, so far as you were concerned, go up or down that ladder?

A. I did not, no, just Mr. Brady.

Q. So at that time you say—you say except Mr. Brady, and I am coming to that. When you saw Mr. Brady going up that ladder, at that time was the gangplank down yet?

A. No, sir.

Q. When you first saw Mr. Brady was he already on the ladder, or was he starting to get on?

A. He was on the ladder.

Q. Was this a long ladder?

A. Yes, sir.

Q. And generally can you tell us how long?

A. Approximately about 30 to 40 feet long, I guess.

Q. And when you saw Inspector Brady, just tell us what you saw him do and what you noticed happen.

A. When I looked up and seen him it was just as though something gave way under him and I seen him struggling and swinging around there, I seen him catch the wood again and then I walked out toward the ladder and I seen this rung fall down into the river, and I know that broke under his weight, so then he got his weight all right on the ladder again, and I don't know now if he went up the ladder or down again, I just looked at that rung that broke and it

looked to be very rotten looking in the part of the ladder that the rung came out, see.

Q. I want you to explain when you say—just what you mean when you say you saw Inspector Brady struggling; just what you mean by that.

A. Like any other man trying to catch his weight, you know; he was trying to grasp another rung or so, and he did so, he just went back up a little, I should say—you know how you climb a ladder. Sometimes something breaks on it and you come down, I don't know how many inches a rung is, and he just hung on and went down to the next rung.

Q. And he disappeared?

A. No, he hung on.

[fol. 85] Q. You have no recollection, you say, whether he continued on or came down again?

A. No.

Q. The part you say was rotten, will you tell us what part you are referring to?

A. That is the plug that fits into that side piece of the ladder.

Q. This was a wooden ladder?

A. Yes, with little wooden steps about an inch and a half diameter, and they fit into these two uprights.

Q. In other words, wooden sides and wooden steps or rungs?

A. Wooden rungs.

Q. And you regularly in the course of your work have been working with and handling wood for a long period of time?

A. Yes.

Q. And the part you say was rotten was the part that fits into the upright, into the side of the upright?

A. That is right.

Mr. Gair: That is all.

Cross-examination.

By Mr. Parmer:

Q. Mr. Dankelman, did this ladder extend at all above the deck of the ship?

A. Yes, it did.

Q. How far above the deck of the ship did the ladder extend?

A. I could not say exactly how far, but it was away up higher than the deck, because the ship had just come inbound and she had a good load on, she was down pretty low, and that ladder extended away up above that top plate some; I just could not tell you how high. It stuck up there pretty high.

Q. And at the place where it had contact with the ship, where it touched the ship, was there a rail?

A. There was a rail, yes, sir.

Q. About how high was that rail above the deck of the ship?

A. Well, this rail stood right on top of that plate.

[fol. 86] Q. What is that?

A. This rail stood right on top of this plate, this top plate. It is a sort of a channel. They call it a channel, see, and it is upside down. What they call the toe of the channel lays down, and it is riveted on top of that plate, and that ladder rested on that channel.

Q. Was it almost perpendicular, or was it——

A. Well, it was about a 45 degree slant like that (illustrating).

Q. 45 degree slant?

A. About 45.

Q. Did you see anybody coming down the ladder?

A. I did not, no, sir.

Q. How long after the ladder was put down did Mr. Brady go up it?

A. I could not exactly tell you that. A few minutes, anyhow, after the ladder hit the dock.

Q. Was there anybody up at the deck of the ship?

A. The sailors was already up on top of one of the hatches there.

Q. On top of one of the hatches?

A. Yes, sir; No. 4 hatch I think it was.

Q. How far had they proceeded at that time with putting out the gangway?

A. They had already hooked up, she had a sling around her ready to be—you see they hoist it over with steam, with power, see.

Q. Yes.

A. And they had already hooked it to go ashore. About 10 or 15 minutes after that ladder was put over the side I guess they put the gangway over.

Q. Did you have any duties on board the ship?

A. Oh, yes.

Q. Why didn't you go up the ladd. ?

Mr. Gair: I object to that, if your Honor please, as being wholly irrelevant, immaterial and incompetent.

The Court: Objection sustained.

Q. How did you get on board the boat when you went aboard?

[fol. 87] Mr. Gair: I object to that on the ground of its being subsequent to the time of the occurrence.

The Court: Overruled.

Q. How did you get on board when you did go on board?

A. I went on board with the gangway.

Q. How long had you previous to this time been working at that dock?

A. Eight years.

Q. How long had you been acquainted with Mr. Brady?

A. Eight years.

Q. And had you observed, during that time, other occasions on which Mr. Brady had gone on board steamships?

A. I don't remember ever using a ladder; no sir.

Q. What is that?

A. I don't remember ever have climbed a ladder before.

Q. I did not ask you that. I said had you observed any occasions when he had gone on board ships?

A. Oh, yes, I have seen him on ships.

Q. Was that his regular business, to go on board ships?

A. Yes, sir.

Q. And was it your regular business to go on board ships, too?

A. Oh, yes; yes, sir.

Q. And were you acquainted with any custom or usual practice with regard to the means provided at that pier for going on board vessels?

Mr. Gair: If your Honor please, I object to that as being wholly irrelevant and immaterial. It seems to me the ladder was placed over the side of the ship. Unless there was some regulation which was made known to Mr. Brady——

The Court: I will let him testify to what he knows about it.

Mr. Parmer: Will you repeat the question.

Q. (Read.) A. Well, we always used to go up on the—we were instructed not to use the ladder, so we always [fol. 88] used to use the gangway. Of course our work called for examining the baggage, and you could not carry baggage down a ladder.

Mr. Gair: I move to strike out any instruction given to this gentleman as a cooper going up a ladder, as having no reference to the inspector of the Customs service, and I move to strike it out.

The Court: No, I will let it stand. He was instructed by whom? You mean by your own people?

The Witness: By the superintendent; yes, sir.

Mr. Gair: May I have an exception, if your Honor please.

The Court: Yes.

Q. Have you seen such ladders as Mr. Brady used put out from vessels arriving at that dock on previous occasions?

A. Yes, I have seen ladders put out; yes, sir.

Q. And had you observed by whom they were customarily used?

A. Well, the pilots generally; I generally used to see the pilots come down from the ship to the dock.

Q. And how long after the accident to Mr. Brady was it that the gangway itself was put out?

A. I should judge about 15 minutes or so.

Q. How far away were you from the broken rung of the ladder when you saw it in that condition which you have described as "rotten"?

A. I was right under it, right alongside of the ladder.

Q. How far above you was it, the rung which you have described as rotten?

A. The rung was about the 13th rung up.

Q. And how high was that?

A. Well, that is about 13 or 14 feet. That is from the dock up.

Q. Did you ascend the ladder to get a better view?

[fol. 89] A. Well, yes, I walked out to the end of the stringpiece and looked up.

Q. Well did you go up the ladder?

A. I did not; no, sir. I did not go on the ladder at all.

Mr. Parmer: That is all.

Re-direct examination.

By Mr. Gair:

Q. Have you observed, in the course of your experience, when this ladder was placed over the side that the members of the crew would go up and down the ladder?

A. Yes, sir.

Re-cross examination.

By Mr. Parmer:

Q. In order to get from that ladder to the ship after you had ascended it, so far as you know what would you have to do?

A. You would have to lower yourself off that top plate there, that beam that runs across; you would have to lower yourself down, sort of jump down onto the top of that deck—that angle-iron down to the bottom of the deck—the top of the deck, rather.

Q. Well, would the rail be in the way at all?

A. No, no; you would just have to step off the ladder down onto the rail and then there would be about a 4-foot drop.

Q. A 4-foot drop from the rail to the deck?

A. That is it.

The Court: From the rail to what?

The Witness: To the deck, the top deck.

Q. Can you give us a little diagram which will show what you mean? Are you good at drawing things?

A. I used to be.

Q. All right. I think it will make it clearer (handing [fol. 90] paper). Draw something which will illustrate what you would have to do when you transfer from the ladder to the deck.

A. (Witness draws sketch.)

Q. Is this the diagram that you have drawn?

A. Yes, sir.

Mr. Parmer: I will mark it in evidence, if your Honor please, and I will have him explain it and we can mark it with letters and numbers so we can understand it.

(Marked Defendant's Exhibit A.)

Q. Now you have here a vertical line with cross lines. That is the ladder, is it?

A. That is a ladder; yes, sir.

Q. And you have here at the top part something which you call——

A. That is the channel that sets on top of that plate. That is the top plate of the ship.

Q. The top plate of the ship?

A. That is the channel sets up on top of that plate, and that channel is bolted right down to these angle-irons.

Q. Then you have the top of the rail written in here?

A. Yes, sir.

Q. At about the same level as this angle-iron you are talking about?

A. Yes; that is pretty near flush there.

Q. And then you have at another level a horizontal line, on top of which you have written the work "deck."

A. That is the deck of the ship.

Q. And is the distance between the deck of the ship and the top of the rail 3 or 4 feet?

A. Between 3 and 4 feet; yes, sir.

Q. And this ladder at the upper end extended above the top of the rail of the ship as you have shown it in the diagram here?

A. Yes, sir.

Q. Now in going up the ladder, after you reach the top of the rail——

A. You have got to swing off on that rail, and some ships [fol. 91] they have a little pair of stairs, see, to get down on a little bit of a table.

The Court: Jump down this thing?

The Witness: Yes.

The Court: Just the same as if you came up to the jury box on this side and you got up to the top and stood there and you wanted to get down you would jump down, or swing down?

The Witness: On the other side, yes. This is just this part like (indicating), and the deck is on the other side.

Q. If the ladder came up to about here on this rail you would have to get up here and jump down here on the other side?

A. That is right.

By the Court:

Q. You said something about seeing this rung of the ladder after it was broken. Where did it fall?

A. Down in the river.

Q. In the river?

A. Yes, sir.

Q. You didn't retrieve it and then look at it afterwards, did you—you just saw it as it fell?

A. I saw it as it fell, and I looked down to the water.

Q. How far was the water from you?

A. I should judge 5 to 6 feet.

Q. When you described it as being in rotten condition, were you near enough to see?

A. Oh, yes, your Honor.

By Mr. Gair:

Q. When you describe something as rotten are you talking now about the piece of the rung that was in the water, or the remaining part of it that was left still sticking into [fol. 92] the side of the ladder?

A. Sticking into the side of the ladder.

By the Court:

Q. That is, it broke in the middle, it didn't break in the end?

A. No, it broke in——

Q. It didn't pull out?

A. It broke in the support, yes.

By Mr. Gair:

Q. I want you to explain it again. Part went away, and that was gone, and you made no examination of it, that fell in the water?

A. No.

Q. The statement you made with respect to a rotten condition was something that you saw still fixed into the side of the ladder?

A. That is it.

Q. Will you tell his Honor and the jury, please, just what part of it was still sticking into the side of the ladder?

A. Yes. A piece of the rung. You all know what a rung of a ladder is. A piece of the rung was sticking in there,

sticking in the uprights. There is two uprights to all ladders.

Q. Be patient with us a minute. You call this the rung (indicating)?

A. Yes, sir.

Q. What does it do, go into a ladder where?

A. Yes, sir; projects in about an inch and a half.

Q. Was part of that part that usually projects in still sticking out?

A. Yes, sir.

Q. And that is the part that you are talking about?

A. That is the part I am talking about.

Mr. Gair: That is all.

(Short recess.)

[fol. 93] MICHAEL E. LYONS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Gair:

Q. Inspector, are you employed by the United States Government?

A. Yes, sir.

Q. In the Customs Service?

A. As a Customs inspector.

Q. And for how many years have you been a Customs inspector?

A. About 25.

Q. And in his lifetime did you know James Brady?

A. Yes, sir.

Q. And for how many years did you know him?

A. About 28.

Q. And were you connected with him in the course of your regular duties at Pier 58 North River on July 9, 1938?

A. I was.

Q. Coming down to the Saturday morning of the accident, do you recall about what time of the day the accident happened?

A. About 9 o'clock.

Q. That is in the morning?

A. In the morning.

Q. And you did not see the accident yourself, Inspector, did you?

A. No.

Q. Do you remember the steamship Unicoi coming into the dock that morning?

A. I do.

Q. And will you tell us, please, was there a division of duties to be performed with respect to that ship between you and Inspector Brady?

A. Mr. Brady, and I was assigned to take care of the vessel.

Q. Yes.

A. He was to board the vessel, swearing the captain to the manifest, pick up the captain's papers, the individual manifests, the crew lists, baggage list.

Q. And you?

A. And I was to examine the passengers' baggage, with his assistance if necessary.

[fol. 94] Q. And the accident happened and you did not see it, you told us. After the accident happened did you have occasion to see Inspector Brady?

A. Yes, he came back to the office.

Q. And what did you notice about him then?

A. He was in pain.

Q. Did you see him holding any part of his body?

A. He was holding his side.

Q. Do you know? Tell the jury, please, the extent of the work he did after that, so far as you remember.

A. He didn't do anything after that.

Q. And did you ever see him back at his work after that Saturday?

A. No.

Q. Of course you were familiar with the fact he died?

A. Yes, he died.

Q. Particularly, Inspector, with reference to ship's ladders, have you in the course of your work boarded the ship by ship's ladders?

A. Many times.

Q. Such as you have heard described here in court?

A. Many times.

Q. And were you ever told or instructed or prohibited from using such a ladder?

A. Never.

Mr. Gair: That is all.

Cross-examination.

By Mr. Parmer:

Q. Did you ever use a gangway, too?

A. I use all means or methods for getting on board ships.

Q. Did you ever ask the people who were operating the ship what method they provided for your use, or did you just go ahead and take anything that was handy?

A. Well, we generally boarded on whatever they provided for us, unless we thought it was unsafe, and if we thought it was unsafe we would not go on, that is all.

[fol. 95] Q. The question I asked you was, were you ever attentive to ascertaining what was provided for you, or did you take anything that was available?

Mr. Gair: I object to the form of the question, if your Honor please—was he ever attentive.

The Court: It is objectionable, but I think he can answer it.

Mr. Parmer: I will ask the stenogropher to read it.

Q. (Read.)

A. Did I take anything that was available?

Q. Maybe it is confusing, I want to know this—I will withdraw that question.

The Witness: It might have been a lift——

The Court: I guess it was so bad that I was wrong in thinking that it could be answered by even an intelligent man like the inspector.

Q. I want to know whether you knew, when you went on board ships that some means of going on board the ship were intended for you and some were not?

A. That is right, yes.

Q. Well now, what have you done or what did you do to find out what was intended for you and what was not intended for you to use?

A. We didn't do anything. The ladder was put up there, we went up.

Q. If there was a ladder down from a ship to the dock, you always took it for granted that it was intended for your use?

A. Absolutely, if there was no other means of egress or ingress.

Q. And did you take it for granted that it was intended for your use when you knew that a gangway was going to be put out later?

A. I don't know anything about that. I didn't say anything about the conditions on that pier that day. [fol. 96]

Q. Well, were you acquainted with conditions at that pier in general from your past work?

A. Certainly I was.

Q. Did you know at that time that such vessels always put out gangways?

A. In recent years always gangways are put out; in recent years, yes.

Q. I don't know what you mean by recent years. I mean at that time did you know that gangways were always put out on such vessels?

A. Yes, surely.

Q. And did you, having such knowledge, assume when you saw this ladder put out, or such ladders, that they were intended for your use?

Mr. Gair: If your Honor please, I object to it on the ground that the question is——

The Court: He said he didn't see the ladder.

The Witness: I didn't see the ladder.

The Court: Did you see it?

The Witness: I did not see the ladder. I don't remember the ladder.

Q. Well did you, in seeing such ladders on other occasions, take it for granted that they were intended for your use without some——

Mr. Gair: I object on the ground it has already been answered by the witness.

The Court: Yes, he has already answered that.

Mr. Parmer: Very good. That is all.

Mr. Gair: Will your Honor take judicial notice of the fact that under the expectancy tables, the mortality tables, the

expectancy of life of Mr. James Brady was 12½ years at the time of his death?

[fol. 97] Now with respect to the funeral bill, I might say that the original is not in our possession, it is in Washington, but that the amount is $480. I can make proof of it by bringing Mrs. Brady back, but I think that is the amount we have been furnished with.

Mr. Parmer: Well I will take your statement, Mr. Gair.

Mr. Gair: There is no dispute about the amount?

Will it be conceded, then, that $480 would be a fair and reasonable sum for the funeral of Mr. Brady?

Mr. Parmer: Yes.

Mr. Gair: If your Honor please, we have medical testimony which has as yet not become available, but will be here at 2 o'clock. I understand that Mr. Parmer would like to take up some questions of law in the absence of the jury in any event, which may consume some time.

The Court: Who said that?

Mr. Gair: Mr. Parmer told me he intended to speak, of course.

The Court: I mean who said it will take considerable time?

Mr. Gair: Considerable? I didn't use that word, but would require some time, of course, to spread on the record.

The Court: I don't think Mr. Parmer takes very long in spreading it on the record, from past experience. He is what you call a direct shooter.

Mr. Gair: Yes. I thought we were both very fast this morning.

The Court: Well, the jury and the Court are here to do whatever is proper. I like to move these cases along just as fast as humanly possible.

[fol. 98] Mr. Parmer: I don't know whether Mr. Gair intends to call another witness who has been subpoenaed.

Mr. Gair: No. I think that has already been covered, the facts, and I don't intend to call any more fact witnesses.

Mr. Parmer: I see.

Mr. Gair: I think everything has been covered with the exception of two doctors we wish to call, and one is coming from Yonkers and will be here at 2 o'clock, and the other will be here at 2.

The Court: Why don't you talk to Mr. Parmer and decide what you would like to have the jury and Court do at the present time.

Mr. Gair: 2 o'clock, of course, would be the handiest suggestion, but if there is anything could be done in the meantime, even in the absence of the jury, why, we could do that.

Mr. Parmer: I would like an opportunity, as I said before, at a certain time in the trial to indicate my position on the law.

The Court: What is the use doing it now and doing it again at the end of the whole case? Why not reserve your motion. It is always a pleasure to hear you, but——

Mr. Parmer: Thank you; and I realize that technically I am not able to make my motion yet because I have not proved the facts upon which it will be made, but I think this might be cited meantime——

Mr. Gair: I think it could be.

Mr. Parmer: This case I have. I don't think you concede that, but I could outline my position to your Honor, which was not fully set forth in the case which you read, the Quinn case.

[fol. 99] The Court: I think I have read enough so I can imagine just exactly what your position is going to be.

Mr. Parmer: Very good.

The Court: It won't require any great exposition on your part, will it, in order to define it?

Mr. Parmer: Well I don't think it will with your Honor, but I have already had difficulty in this court in getting my position across. I have already had some difficulty——

The Court: Well when you say getting it across you mean making it effective?

Mr. Parmer: To be specific, I really think to have one judge understand it—I don't think he understands my position yet.

The Court: I feel very much complimented, but I am not at all sure your psychology is good, so far as I am concerned.

Mr. Parmer: Well, it is not entirely intended as a compliment, but your Honor has had experience with this particular branch of litigation.

The Court: Well I return to my original inquiry as to what you gentlemen wish the jury and Court to do at the present time, 20 minutes past 12. Shall we take a recess until 2 o'clock?

Mr. Gair: I think so.

Mr. Parmer: Very good.

The Court: Or have you something else we can do meantime?

Mr. Parmer: Well I would like to call later this one witness who has been subpoenaed by Mr. Gair, and whom he has not called, and if I might call him out of order I would save the time.

Mr. Gair: I have no objection to that whatever.

[fol. 100] WILLIAM WRIGHT, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. Wright, how old are you?

A. 56-7.

Q. And by whom are you employed now?

A. I am employed by the United States Lines.

Q. Do you mean to say that you changed your employment recently?

A. Well, since I have been with that concern, I am 30 years with the same line.

Q. And in July, 1938 by whom were you employed?

A. The United States Lines.

Q. And were you present at the time that Mr. Brady was on the ladder?

A. Yes, sir.

Q. Did you see something happen to him on the ladder?

A. A bit of commotion up at the top.

Q. A bit of commotion you describe?

A. Yes, sir.

Q. Tell us in more detail what you saw?

A. I looked up and Mr. Brady was hanging on a rung with his foot below the one that was broke, and then he went on aboard the ship.

Q. You mean he went up?

A. Up; and there is a bulwark, and here is the ship coming up and this ladder was about 8 or 9 feet above this bulwark, and he had to get around and stand on this bulwark to get to the well deck of the ship. That is about all I see.

Q. You say he has to do it. Are you trying to tell us in that language that you saw him do it?

A. No, I am not telling you that, but that is how he got on if he got on any way.

Q. Did you see him get on in that way?

A. I see him get on that way.

The Court: Get on what?

[fol. 101] The Witness: Get on the ship, sir.

The Court: That was after the rung had broken?

The Witness: Yes, sir.

Q. Well did you see Mr. Brady at any time thereafter on that day?

A. I seen him in the Customs House, or up around that section; that is the Customs House on the pier, and he asked me would I be a witness and I said sure, I said I seen it happen.

Q. Well how long after this accident happened was it that you saw him later on in the day?

A. It might have been—in the afternoon it was.

Q. Four or five hours after?

A. About four or five hours after the accident.

Q. Did he say anything with respect to what had happened to him?

A. I asked him what happened, and he said "I got a pain in my leg," and he pointed up here some place (indicating).

Q. Is that the only complaint in regard to pain that he made?

A. That is all. I told him I would be his witness, and so forth.

Mr. Parker: That is all.

Cross-examination.

By Mr. Gair:

Q. Mr. Wright, you were subpoenaed here to court by us; that is, by the attorneys for Mrs. Brady?

A. Yes, sir.

Q. Were you subpoenaed here to court by the attorneys for the Roosevelt Company?

A. No, sir.

Q. You really came to court in response to our subpoena?

A. Yes, sir.

Q. Now after you came to court we spoke to you this morning; that is, my office representative spoke to you in the hall?

A. Yes, sir.

[fol. 102] Q. And you also spoke to Mr. Parmer, the attorney for the company?

A. Just a minute here.

Q. While the Court was in recess?

A. Yes.

Q. He came over and spoke with you then?

A. Yes.

Q. Well now, did you have any conversation with Mr. Parmer about whether the complaint that Mr. Brady had made after the accident was of pain in his leg or pain in his side?

A. I told him to look at my statement, he would find that out.

Q. You remember you made a statement for the attorneys for Mrs. Brady?

A. Yes, sir.

Q. Do you recall how soon after the accident you made that statement?

A. Oh, I could not exactly say.

Q. Approximately.

A. I could not tell you.

Q. Was it within a week?

A. It might have been.

Q. A week or two?

A. I could not exactly say.

Q. It was shortly after he died?

A. Yes, it was after he died.

Q. Well, can you tell us whether it was within a month after he died?

A. I don't know. I could not tell you, sir.

Q. Well now, this statement that you made bears your signature, does it not?

A. That is right.

Q. And not only does it bear your signature, but at the bottom in your own handwriting didn't you write the words "I read the above and know it to be true"?

A. That is right.

Mr. Gair: I offer it in evidence.

Mr. Parmer: No objection.

(Marked Plaintiff's Exhibit 3.)

Q. Do you say to this jury, Mr. Wright, that Inspector Brady did not tell you that he hurt his right side?

A. He did not.

Q. Do you recall that when you saw him right after this commotion his body was swinging?

A. That is right.

[fol. 103] Q. When you say his body was swinging, what do you mean by that?

A. He was making a grasp for the other rung to hold himself on, and naturally your body will swing.

Q. At the times you have in mind, did you see his body swinging from side to side, or swinging around to regain his balance?

A. Well, yes, it did.

Mr. Gair: May I read this to the jury, please?

The Court: Certainly.

(Plaintiff's Exhibit 3 read to the jury.)

Q. Do you know of your own knowledge whether there is any connection between the Roosevelt Lines and the United States Lines?

Mr. Parmer: I object to that, unless he has knowledge.

A. I don't know whether there is or not.

Redirect examination.

By Mr. Parmer:

Q. Mr. Wright, did someone else see you on some other occasion and obtain a statement from you?

A. Well, they came down to get statements off me, but I told them I had made that out.

Q. What is that?

A. They came down there, I don't know who it was, but I made a statement out for the first chap, whoever he was, I don't remember him, and that is the only one statement I made out.

Q. Well, see if this is your signature to this paper (handing to witness)?

A. That is right.

Q. It that your signature?

A. Yes, sir.

Q. Does that refresh your recollection?

A. Yes, sir, it does.

[fol. 104] Q. With respect to whether you signed one or two statements?

A. Yes, sir.

Q. Can you recall when you signed this statement?

A. That was made out on the dock.

Q. This statement, marked Plaintiff's Exhibit 3, this statement that was produced by Mrs. Brady's lawyer—when, if you can——

A. It was down on the dock, but it was away after the time.

Q. What is that?

A. That was after the death of Mr. Brady.

Q. You don't recall when?

A. I don't recall when, sir.

Mr. Parmer: There is no date appearing upon it, Mr. Gair.

Mr. Gair: That is why I inquired.

Mr. Parmer: Do you have any information as to when——

Mr. Gair: We were not the attorneys at that time.

Mr. Parmer: I see.

Q. Now do you recall when you signed this statement which I have just shown you now?

A. Yes, sir.

Q. About when was that?

A. I reported it that day and gave it to the—reported to my timekeeper first.

Q. Yes.

A. Gave him all the facts on it.

Q. Yes.

A. Then I did sign something. That is the timekeeper's, isn't it? But I make these reports to my timekeeper when an accident occurs on the dock, I make a report to the timekeeper right away and cover everything, and I imagine I signed the same day.

Q. Well now, will you explain, Mr. Wright, how it comes that in this statement which has been produced by the lawyer for Mrs. Brady it says here, over your signature, "I asked Mr. Brady was he hurt, He pointed to his right side. A short time later I saw him and told him I had [fol. 105] reported his accident. He told me he hurt his right side." Can you explain how that is in there?

A. I can't explain it. The only conversation I had with Mr. Brady was when he was up in the Customs House.

Q. Yes.

A. Around that section. I asked him, "Jim, how are you feeling"? And he said "I hurt my leg," or something. He might have pointed out that way (indicating), the knee or his stomach.

Mr. Gair: I don't get that.

The Witness: I say when I met Brady after a while I said, "How are you feeling, Jim," and he said "My leg," so the hurt may have been up higher than where he pointed.

Mr. Gair: Did you ask him where he pointed?

Mr. Parmer: No, I didn't ask him where he pointed. He pointed to his leg, and he said the hurt might have been up higher than that.

The Witness: Right around here (indicating).

Mr. Gair: Will you please stand up? And he pointed where?

The Witness: About there (indicating).

Mr. Gair: Above the knee?

The Witness: Well, yes.

Q. Did he show the leg to you?

A. No, sir.

Q. How long had you known Mr. Brady before the accident?

A. Oh. I had known him for years.

Q. How many years?

A. I will say 15 at least. He has been on and around the piers a long while.

Mr. Parmer: That is all.

Mr. Gair: That is all, sir.

The Court: Now you want to take a recess; is that the idea?

Mr. Gair: Yes, sir.

(Recess to 2:15 p. m.)

[fol. 106] Afternoon Session

(Testimony of Dr. Enrique A. Lopez, omitted.)

(Testimony of Dr. Edward Adams, omitted.)

Mr. Gair: That is the plaintiff's case. Plaintiff rests.

(Court and counsel in conference at the bench.)

Mr. Parmer: I move on behalf of the defendant to dismiss the complaint, on the ground that there has been a total failure of proof of any negligence on the part of this defendant, or on the part of any person for whom this defendant would be legally responsible.

The Court: I will deny your motion at this time. You may renew it at the end of the case, and I give you an exception.

Mr. Parmer: Exception.

The Court: We will adjourn until 10:30 tomorrow morning. I think you said there was some proof of a legal and technical nature, in which unless they are particularly interested the jurors need not be present.

Mr. Parmer: That is right.

The Court: What do you suggest in that respect?

Mr. Parmer: I suggest that we might take about one hour, or at the outside an hour and a half, and that the jury——

The Court: From that time on how long will the case take, do you think?

Mr. Parmer: Thereafter my case would not take longer than an hour.

The Court: You are suggesting, then, that we ask the jury to come back at half-past eleven instead of half-past ten?

Mr. Parmer: Yes, I am.

[fol. 107] The Court: I assume the jury will not be averse to that disposition. We will put it off until tomorrow at 11:30 so far as the jury is concerned.

(Adjourned to October 21, 1941, at 10:30 a. m.)

New York, October 21, 1941;
10:30 o'clock, a. m.

Trial Resumed

William E. Collins, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. Collins, you are a member of the bar of this court?
A. I am.

Q. And do you have employment by the United States?

A. I do. I am District Counsel at New York for the United States Maritime Commission, and also special assistant to the United States Attorney for this district in admiralty matters.

Q. And have you received any instructions on behalf of the United States with regard to this case we are now trying, Brady vs. Roosevelt Steamship Company?

Mr. Gair: I object to that as incompetent, irrelevant and immaterial.

The Court: What is that?

Mr. Parmer: It is that the United States has an interest in this case which they wish us to put before your Honor.

[fol. 108] The Court: I suppose that is argument. It will appear from the contract, and I don't believe it is denied.

Mr. Parmer: Well, the interest that they have, your Honor—what I wanted to show by proof because the Supreme Court in the Johnson case said it might be shown, is that there is an objection on the part of the United States to this case proceeding at common law.

The Court: I understand the point clearly.

Mr. Parmer: And I merely wanted to present it in the way that it is indicated in the case I should.

The Court: The mere fact that he has received instructions from somebody doesn't help. I will assume he is here by authority.

Mr. Parmer: Meaning we don't have to prove any instructions?

The Court: Yes.

Q. Do you on behalf of the United States wish to inform the Court as to the position of the United States with respect to this case?

Mr. Gair: I object to that, if your Honor please, as not binding upon the plaintiff and not relevant or material to any issue in this action.

The Court: I will assume that he does, and I will take it his answer is yes.

Q. Will you please, therefore, inform the Court of the position of the United States with respect to the maintenance of this case at common law?

Mr. Gair: Same objection.

The Court: Same ruling.

[fol. 109] Mr. Parmer: Do you rule that——

The Court: I rule that he can go ahead.

A. I have received instructions to object to the bringing of this case at common law as contrary to the policy of the Government in these matters, which it has consistently pursued, to my knowledge, for at least 15 years. That is, it has taken the position that since the Congress provided in the Suits in Admiralty Act a cause of action in Admiralty or damage in admiralty in any case having admiralty jurisdiction, litigants should be confined to the admiralty court in those cases, and the Government could not and should not consent to or approve the bringing of those actions at common law with jury trials.

Q. What is the position of the United States with respect to the payment of any judgment that might be rendered against Roosevelt Steamship Company?

Mr. Gair: I object to that, if your Honor please, on the ground that there is a contract between these parties which defines their relationship.

The Court: I will sustain that objection.

Q. Mr. Collins, in stating your objection on behalf of the Government to the maintenance of this case, you referred to cases brought against the United States. I am going to ask you whether the language you used was meant to be confined to cases brought against the United States or is it applicable to cases brought against agents as well?

Mr. Gair: I object to that, if your Honor please, unless the witness is now stating under the ruling of your Honor that these are specific instructions given him with reference to other cases.

The Court: I will let him testify.

[fol. 110] A. My answer was intended to extend to all cases brought against the managing agents of Government merchant vessels, because obviously there could be no action at law against the United States. As I have said, the United States has consistently maintained that these suits should be brought in admiralty. If any judgment were obtained against these operators at common law, the Government would have to pay them.

Mr. Gair: I object to that. The question with respect to judgments is not involved in the answer to the question put.

The Court: I will let it stand.
Mr. Parmer: That is all.

Cross-examination.

By Mr. Gair:

Q. Have you any letters with you with respect to what you just testified to?
A. I didn't bring any letter with me, but I——
Q. That is an answer. Have you any such documentary letters with you?
A. No.

Mr. Gair: That is all.

Wilbur F. Carley, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. Carley, what is your employment?
A. I am certifying officer for the United States Maritime Commission.
[fol. 111] Q. And what does that mean?
A. Why, with respect to payments made by the Treasury Department in connection with managing operators' commitments, certifying to the thing.
Q. In 1938 did you have such a position?
A. Yes.
Q. And did you have anything to do with the managing agreement between the Maritime Commission and the Roosevelt Steamship Line, which included the steamship Unicoi?
A. Yes, I did.
Q. And in the course of your certifying, will you tell us just what you do?
A. Why, any commitments incurred by any of the vessels under operation by the Roosevelt Steamship Company are submitted to me for certification to the Treasury Department for payment.
Q. And in the course of that practice what bills were actually paid by the United States?

Mr. Gair: If your Honor please, I object again, on the ground that that subject as to what is to be paid by the Government and what expenses are not to be paid, and what the company itself is to pay is fully defined by the contract.

The Court: I think that is true.

Mr. Parmer: The practice, your Honor, will show actually what was done by the parties. It is not an amendment to the contract.

The Court: The agreement itself is perfectly clear on that subject. I don't see that the practical construction is going to help very much.

Mr. Parmer: Of course if it is clear there is no point to the evidence; I agree with you on that.

The Court: I haven't read through the agreement itself, but a recovery in such an action as this would be included among the disbursement payments which would be sub-
[fol. 112] mitted by the Roosevelt Steamship Company to the Maritime Commission.

Mr. Gair: We don't agree to that at all, on the ground that this would be a dereliction, it would be incurred in a dereliction of a duty and something for which they were supposed to indemnify the Government, and if the Government paid it out they could sue them for it and collect.

The Court: However, I think it is precluded by the decision of the Circuit Court of Appeals in the Quinn case, insofar as I am concerned.

Mr. Parmer: Well, so far as operation and control of the vessel, that, your Honor, should be precluded; but that is not the point I am raising here as to who operated and controlled this vessel. My sole point here is assuming that the C.C.A. is right and that we did operate this vessel and all these people are our agents, nevertheless by reason of the contract the Government pays the bill eventually, and that is really the point I am making.

Mr. Gair: Under any construction of this contract the United States not only would not pay the bill, but it is not called upon to pay the bill, because it requires the steamship company to make proper repairs.

The Court: Well, I certainly am in no position to determine that question now, and I don't think it is germane to this particular inquiry.

Mr. Parmer: I have here a witness who knows what bills were actually paid under the contract, and if there be a

dispute between us as to the meaning of words, I take it that his evidence might be helpful in determining what it meant.

The Court: What bills were paid in the past?

Mr. Parmer: What bills were paid under this contract at the time of this controversy.

[fol. 113] The Court: There, again, we might be trying any number of issues which have nothing to do with this case, even assuming that you are right that such testimony as that would be competent in connection with this controversy, but I don't think this Court should do that—go outside to determine whether such bills as he might say were paid in 1938 were properly paid under this contract.

Mr. Parmer: I don't submit it to your Honor to show that they were properly paid. Your Honor would have to determine whether they were properly paid, of course.

The Court: But I certainly am in no position to do that, and there might be a controversy about it and I would be trying issues here for days.

Mr. Parmer: I offer to prove, your Honor, that among the bills that were paid by the United States were judgments against an agent for tort committed on a vessel; in other words, a judgment in which Roosevelt Steamship Company was one of the parties. That would be relevant to the sole point I am making here, that the Government pays these bills.

The Court: I will rule that that is not competent evidence in this case, and will therefore preclude that evidence.

Mr. Parmer: Very good. I have an exception to that.

The Court: Exception if you need one.

Mr. Parmer: I forgot. It is a new rule.

Mr. Gair: If your Honor please, I have just found a letter that has been shown to me from our files with respect to Mr. Collins's authority, a letter written from Washing-

[fol. 114] ton, and in view of the fact that this gentleman has asserted he had some authority, a paragraph in this letter to the effect that he has none I think might be germane. I would like to have Mr. Parmer read it and see if we can consent to offering it in evidence. The letter——

Mr. Parmer: If you can have the writer here I might.

Mr. Gair: Well, here is a man comes here and says he has authority to do a certain thing, and here is a letter from Washington says he has not.

Mr. Parmer: Well, he swears to it, and this man writes a letter to you or somebody else——

Mr. Gair: Well, I want to have the complete picture, although I don't think it is material one way or the other.

Mr. Parmer: I would be glad if you would put the man on the stand to question his authority.

Mr. Gair: Here is the letter that says he has none.

Mr. Parmer: That serves no point. I have already explained to Mr. Gair about that.

I would like to know if he will concede now, stipulate with me that from the beginning, or from a certain date subsequent to the death of Mr. Brady, Mrs. Brady has been receiving from the United States of America compensation payments pursuant to an award of the United States Employees' Compensation Commission.

Mr. Gair: I will concede that, if you will concede also that she must pay back out of any recovery in this action. That is under the same statute.

Mr. Parmer: Yes; in other words, if she recovers here she must first pay back the United States Employees' Compensation Commission the amount that they have paid her. [fol. 115] Mr. Gair: That is true. We will concede that. But so far as the present trial is concerned, it makes no difference. Whatever the lien of the Government is for that will have to be made good.

Mr. Parmer: It certainly means that if the United States has to pay the bill here it is one arm of the United States contributing to the other; that is what it amounts to.

Mr. Gair: Yes, but I don't agree to the first premise, that the United States Government has to pay the bill here for an award we may get in this trial, because they certify, and the Government has assented at least by making this payment for two years.

Mr. Parmer: I maintain that was brought about, your Honor, because I think your Honor is familiar with insurance methods, P. & I. accounts, and I think there is no doubt about it, because here our insurance is subject to a deductible, and there is a deductible here that is assumed ultimately and finally by the United States. I had offered to——

Mr. Gair: Besides, an eighty thousand dollar bond——

Mr. Parmer: Let me finish. I wanted to prove before your Honor by the last witness that the actual check in

payment of judgments rendered against both the United States and the agent is a Government check. It pays the judgment. And from there on, to prove that what the United States does is to submit its claim of which the judgment is a part to the insurance company, but it gets back only a part of what it pays, because there is a deductible, and therefore it is untrue to say that the Government is insured. That is irrelevant, anyway. The Government pays [fol. 116] the bill in the first instance, but then, as a matter of fact, it assumes a part of this obligation against its agent.

And I might say further, with regard to the claim that somebody employed by the United States Employees' Compensation Commission says that Mr. Collins is unauthorized to represent the United States, taking some of the curtains away from what is going on, I think your Honor can see that what is happening here is that the United States Employees' Compensation Commission, having paid the compensation, wishes to get it back from somebody and is not in the least interested whether it gets it back from the Government, the insurance company or anybody else, and therefore they question Mr. Collins's authority, but your Honor knows him, he has appeared before you many a time as a representative of the Government.

The Court: Yes.

Mr. Parmer: That is all my proof on the technical point, your Honor, that I have. I thought it would take longer, but your Honor overruled me.

(Discussion off the record.)

Mr. Parmer: Your Honor, I move that the action now pending against the Roosevelt Steamship Company, Inc., be dismissed on the ground that the Court has not jurisdiction of the subject matter. My motion is not based upon a contention that Roosevelt Steamship Company did not control and operate the vessel. I am assuming, for the purpose of this motion, that Roosevelt Steamship Company did operate and control the vessel and employed the members of the crew. I am assuming that, although I disagree with the decision of the Circuit Court of Appeals, but out of deference to that which it seems to hold. That [fol. 117] decision is now before the Supreme Court on a petition for certiorari, and if the petition is granted we

will hear further with regard to that. But I say now that, assuming that Roosevelt Steamship Company, by reason of this contract, employed the crew, that they were its agents, nevertheless this Court has not jurisdiction of the subject matter by reason of the decision of the Supreme Court in the case of Johnson v. Fleet Corporation.

In the case of Johnson v. Fleet Corporation, the United States was sued through the Fleet Corporation, and also the operating agents were sued as well, and the Supreme Court held there that since it appeared that the money which would be used to pay any judgment which might be rendered either against the agent or the Fleet Corporation would come directly or mediately from the Government, the exclusive remedy was the remedy afforded by the Suits in Admiralty Act.

That is the situation, essentially, here. The Suits in Admiralty Act provides that where, if the vessel were privately owned, a suit could be maintained *in personam* or *in rem* on account of the tort, the remedy must be—the remedy must be pursued under the Suits in Admiralty Act against the United States, and the Supreme Court in the Johnson case says it must be pursued only in Admiralty. That is both with regard to the agent and with regard to the United States itself.

That has been the constant and consistent line of decisions since. I can remember a case of my own in the Court of Appeals of New York where I adopted the same theory which is being presented here.

[fol. 118] The Court: Most of those suits were against the Shipping Board as constituted then, were they not? I recall, I think it was the second jury case that I tried when I went on the bench in 1929——

Mr. Parmer: Yes.

The Court: —was a recovery against the Shipping Board of $10,000.

Mr. Parmer: Right.

The Court: The Circuit Court of Appeals—just before it came up for argument the Johnson case came down, the judgment was set aside, and then there was the Enabling Act——

Mr. Parmer: It is true most of them were against the Shipping Board itself, but some of them, and one of those with which the Supreme Court was concerned, was in the Johnson case against the agent, and the Supreme Court particularly refers to the agent and says that it applies to the agent

as well as to the Government itself. But I was telling your Honor about the case that I had myself in the Court of Appeals, where I endeavored to present the same argument that is being presented against me here, and I was told I was wrong. That was the case of Shea v. United States Merchant Fleet Corporation and the Export Steamship Company, and I tried very hard to hold the agent, but they said the money comes eventually from the Government to pay this bill, it doesn't make any difference whether you sue the agent or the Government itself as represented by the Shipping Board Fleet Corporation.

The Court: If you make such a broad assertion as that the money eventually comes from the Government, I suppose that that would apply to almost every contract which is being [fol. 119] made at the present time, not limited to contracts with respect to the operation of vessels, but anything else.

Mr. Parmer: Well, not any contract which the Government may make; but any contract where the Government contracts with certain people to do its work as an agent it impliedly contracts to bear the expenses of the operation, and one of the expenses of running ships is the payment of judgments for tort.

The Court: I know, but if the test is that the money, as you say, the money eventually comes out of the Government, I say that that might very well apply to a tort suit against a munitions plant which is now devoting its entire attention to manufacturing munitions under the defense program, and paid entirely by the Government. In other words, that any recovery against that company for tort would ultimately come out of the Government. Now would that be the test?

Mr. Parmer: But your Honor uses "the money coming out of the Government" in a different sense——

The Court: Yes.

Mr. Parmer: From that in which I used it.

The Court: Well, you know of many large concerns which are getting their entire revenue today from operations under the defense program.

Mr. Parmer: Yes, that is true. But, after all——

The Court: Of course, they would not be sued in admiralty.

Mr. Parmer: No. It is perfectly true the money that I have today X may have tomorrow and Y may have the day after. In that particular sense you may say the money

comes from me, but that is not the sense in which the Su-
[fol. 120] preme Court uses the words here in the Johnson case. They meant it is the Government which eventually bears the loss, and that is the situation here, the Government eventually bears the loss. It pays its money in order to keep this agent whole. It is required to by the principles of agency, and as I endeavored to show, it recognized its obligation and in practice did it.

The Court: It all comes back to the construction of the statute and the construction, too, I suppose, of the contract.

Mr. Parmer: It does; and with respect to that I submit that the construction of the contract as exemplified by the Quinn decision is another matter in this case, because the Quinn case was not a Suits in Admiralty case. The Quinn case was a case that a ship ran into a bridge, it was a land tort, it was a case where the deceased could not have sued under the Suits in Admiralty Act. The point of exclusive jurisdiction under the Suits in Admiralty Act was not involved there.

The Court: Well, that was an Admiralty suit with a jury, anyway, the Quinn case.

Mr. Parmer: I don't know whether it was an admiralty suit, I am not sure. I know it was not an admiralty tort. It was not a case——

The Court: It was a suit in admiralty without a jury, as I recall it.

Mr. Gair: In any event, if your Honor please,—I don't want to foreclose the argument, it is interesting to listen to,—but the Johnson case and all the implications of the Johnson decision, everything Mr. Parmer is now saying, were raised in the affidavit before Judge Mandelbaum and were passed upon, and it would be the law of the case, as no appeal was taken.

[fol. 121] Mr. Parmer: As regards that, I have consulted Judge Mandelbaum's secretary, and he in turn, he advised me, has consulted the Judge, and I pointed out to him that the decision of Judge Mandelbaum had left the matter in a somewhat ambiguous shape, because he seemed to deal with the matter solely as if it were a question of control of the vessel, and I went to him and asked him if he thought it would serve a purpose to have re-argument in the matter, and he said that he thought that you would not be restrained in any way in forming an opinion with regard to this matter that was being presented to you.

The Court: Well, Judge Mandelbaum's decision has been completely superseded by the decision of the Circuit Court of Appeals, has it not? And that, as I read the opinion, is rather a sweeping decision.

Mr. Parmer: It is a controlling decision on the point, I fear.

The Court: As Judge Frank says, the plaintiff or the libellant, or the defendant as it was in that case, has two strings to his bow.

Mr. Parmer: Yes, that is true; and so far as that decision is concerned it is sweeping, he has two strings to his bow; he can sue the United States or he can sue the owner. That is true. Now the point is, we say here the man can sue the United States or he can sue the agent, but because it is a Suits in Admiralty case, an admiralty tort, he must sue the United States and the agent under the Suits in Admiralty Act in admiralty. The exclusive remedy against both is in admiralty. It is an entirely different point than was raised in the Quinn case, although at first blush you would think it is the same thing.

[fol. 122] The Court: Well, what advantage is there in suing in admiralty rather than in law?

Mr. Parmer: I could mention several.

The Court: I don't like to press that point. You recall that the Supreme Court at one time took a case in which I was involved and ultimately reversed it, largely because I think they wanted to emphasize the fact that there was no difficulty in cases at common law where juries were required because, as they stated, the judge, in the event of an excessive verdict rendered, had control of the situation.

Mr. Parmer: Well, ordinarily that would be the reason which I would assign to your Honor for not wishing to proceed at common law and preferring to proceed in admiralty, to escape a jury. There is no secret about such procedure. But that is not the reason here, primarily. The reason here is simply this, that this woman's rights against the United States are these: under the Compensation Act, where she has proceeded, she is allowed to get the weekly payments from the United States, which she has gotten for these years and will continue to get, and what she is trying to do is, by suing the agent at common law instead of in admiralty, is to get an extra amount which will be eventually paid by the United States, another branch of the

United States, insured in part but not in whole, which she could not do if she sued under the Suits in Admiralty Act, because if she sued under the Suits in Admiralty Act she would have to include the United States of America as one of the parties respondent, and the Act provides, or the Supreme Court has held, that you cannot get both compensation from the United States and sue the United States, [fol. 123] you must elect between one or the other; you may elect between getting compensation from the United States and suing a third party. Or you may sue, but you may not get compensation from the United States and thereafter sue the United States, because that is a double recovery. And by a device, in which I have to tear the cover of this thing away, it is only a device, they seek to get around that situation by suing the agent at common law, and so I present to your Honor the real facts of the situation, that the agent himself is to be indemnified by the United States, and, therefore, according to the Supreme Court decision, the suit must be brought in admiralty.

If it is brought in admiralty, that is the end of the case, and she goes on getting her compensation and nobody is hurt, but she can't get this extra amount. Indeed, the election which the law allows her does not allow her such an election. That is the essence of this point. That is why I press the point.

Mr. Gair: So far as we are concerned it is the same situation with the Federal Compensation Law as with the New York State Compensation law, which has now been brought into line with the Federal Compensation Law. In other words, you can get your compensation and start your third party action, but whatever has been paid to you in compensation must be paid back, and you don't get any further compensation after you have gotten your third party award, until that has been exhausted, and if the amount you got in compensation was less than you get in the common law action, you don't get any more compensation.

The Court: Well, according to Mr. Parmer you could not [fol. 124] bring the action at all without electing prior to bringing the action.

Mr. Gair: There is no such law as to election. He is talking of suing the United States Government. But so far as suing the third party is concerned, if it is in tort they have no standing to urge that at all. It is a new wrinkle to me

that the Government will have to indemnify its own agents for its agent's wrongs, when it is stipulated in the contract that the agent shall not commit that wrong.

Mr. Parmer: Your Honor, this is not indemnification for the agent's wrong, it is indemnification for the agent's liability for the wrong of some member of the crew, and that is an entirely different thing. It is a vicarious responsibility.

Mr. Gair: A crew selected by the agent.

Mr. Parmer: That makes no difference. There is no wrong, there is no breach of a contract here by the Roosevelt Line. There is some liability that is to be determined here, because it is a principal, it is said to be a principal.

Mr. Gair: How else can an agent ever act for its corporation, except through the crew on a boat?

Mr. Parmer: Well, there have been decisions of this Circuit illustrating that. For instance, the recent case of the Morro Castle, where there was privity on the part of the corporation by reason of the managing officers. There is one case. But there is here no question of privity, it is just some act on the part of some bo'sun or officer of a ship for which, if there is a judgment against the Roosevelt Line, it will be responsible.

Now it is of the essence of my argument that I recognize that an agent can be responsible for his tort. Of course [fol. 125] he can be responsible for his tort, and he can also be responsible for the tort of his sub-agent, that is viewing him as a principal, and it is with regard to this latter that we are concerned here, and the plea of Mr. Gair that this is a suit against a third party is really specious. It is nominally a third party, but by reason of the obligation of the United States to indemnify and to pay its bill, under the decision of the Johnson case, it is not really a third party at all, it becomes the United States.

In other words, to put it in colloquial language, this is the United States' baby, because it must pay the bill, and that is what it is essentially, and what the complainant is doing is electing, but not electing at all, it is first getting compensation from the Government with one hand and with the other hand getting a judgment against the United States, which cannot be done.

Mr. Gair: Well that certainly shows the power of speech, that we have taken this plain contract, and, by this talking

about it, have wound it into such a form, and it is so distorted as not to bear any semblance to the contract. We are not suing the Government, and the Government is not called upon, so far as our contract here is concerned and the Government's relationship, to do anything. It said to this agent, "We are giving you the ship, you operate it, you select your own crew with first officers, we have to O. K. them but they are your officers; so far as the equipment is concerned, you must inspect it, you must keep it in reasonable repair and indemnify us". That is what this contract says, by the big United States, "and put up a bond of $80,000." Then they come up and give the person a rotten [fol. 126] ladder and the ladder breaks and the person falls down and now they say we are suing the Government, and I think that is just juggling with words.

The Court: I don't think there is anything I can do about it. After all, I am pretty well circumscribed by the decision of the Circuit Court of Appeals in the Quinn case, and I think this question is essentially the question presented there, and it will have to be resolved by the Supreme Court of the United States.

Mr. Parmer: Well if it were the same question, or if I thought it were the same question, your Honor, I would not raise it before your Honor.

The Court: I understand.

Mr. Parmer: After all, here is this Johnson case that has been good law, and I would ask your Honor to read it again, because the agent——

The Court: I have read it a good many times, and it goes back now for at least 11 years, and so far as I am concerned I have had a good many cases on it prior to the time the decision came down.

Mr. Parmer: Does your Honor see what is going to happen, so far as suits under the Suits in Admiralty Act are concerned?

The Court: Yes, I see.

Mr. Parmer: Then the decision of the Supreme Court in the Johnson case is really rendered meaningless. If they can sue the agent it makes no difference.

The Court: Yes, but the Circuit Court of Appeals has been responsible for that, if there has been any such result as you say.

Mr. Parmer: Well, perhaps your Honor thinks that the [fol. 127] Quinn case was a case involving a maritime tort.

The Court: I take your word for it that it was not.

Mr. Parmer: They hit a bridge.

The Court: They hit a bridge, yes.

Mr. Gair: Going through a canal.

Mr. Parmer: That is right. They hit a bridge, and that is a land tort; no remedy against the United States under the Suits in Admiralty right there, and it is only where the remedy is afforded by the Suits in Admiralty Act that it is exclusive, and there it was not, so the point I am raising could not be raised there.

The Court: It is not an admiralty suit at all.

Mr. Parmer: No, it is not.

The Court: I didn't know how that suit got before Judge Moscowitz. That was a suit without jury, because it appeared that Judge Moscowitz said they might submit findings of fact and conclusions of law.

(Further discussion, not reported.)

The Court: I don't think there is any use prolonging this discussion at this time. I will deny the motion and give you an exception.

Mr. Parmer: Very good.

(Short recess.)

Mr. Parmer: Your Honor, in connection with the motion to dismiss on the ground of lack of jurisdiction, I want to have marked for identification what purport to be certain vouchers for the payment of bills incurred in the operation of the steamship Unicoi during the voyage which was end- [fol. 128] ing at the time of the accident in the Brady case.

The Court: You want to incorporate that as part of the offer which you made?

Mr. Parmer: Yes, I do.

The Court: All right. They will be marked for identification.

(40 vouchers and 1 payroll sheet marked Defendant's Exhibit C for identification.)

Mr. Parmer: And I also want to offer, in connection with this same offer of proof, for identification only, the vouchers for the payment of a judgment against the United

States of America and Roosevelt Steamship Company in the District Court of the United States for the Eastern District of Pennsylvania, together with the vouchers for the legal services rendered in defense of both the United States and the Roosevelt Line.

(Marked Defendant's Exhibit D for identification.)

Mr. Parmer: Your Honor, I have two other witnesses, whose testimony will be on the merits, and I think we might have the jury recalled.

(Jury recalled at 11.52 a. m.)

JOHN MCCARTHY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Parmer:

Q. Mr. McCarthy, how old are you?
A. 38.
Q. And by whom are you employed?
A. American President Line.
[fol. 129] Q. Is that the successor of the Dollar Line?
A. Yes, sir.
Q. And how long have you been employed by them?
A. Almost two years.
Q. And what is your job?
A. Clerk.
Q. What was your employment before you worked for the American President Line?
A. Before that, American Pioneer, as clerk.
Q. Was that one of the companies associated with the United States Lines?
A. Yes, sir.
Q. And what was your job there?
A. Clerk.
Q. And what do you do as clerk?
A. Assistant timekeeper.
Q. Did you know Mr. Brady, the Customs inspector, whose widow is bringing this case?
A. I did know him in a way, yes, sir.

Q. When you say "in a way", will you describe what you knew about him?

A. I knew him because at times I had to go into his office and talk to him about different papers, and so forth.

Q. Where did he work in connection with your work as a clerk—what pier did you work at?

A. Pier 58.

Q. Now, did you see him on the day that he had his accident?

A. Yes, sir; I did.

Q. Will you tell us where, and about what time of day you saw him, and under what circumstances?

A. The only thing I can say is that I saw him in the morning right after the accident.

Q. Yes.

A. I would not say how long after, because I don't recall; it is a couple of years ago, you know.

Q. Yes.

A. So he came in the office and reported that he was injured, and I made the report, I made the regular report out.

Q. What did Mr. Brady tell you about what injury he had received?

A. So far as I can recollect, he just told me he was injured in his leg, in the calf of his leg.

[fol. 130] Mr. Gair: If your Honor please, I move to strike out the answer, upon the ground it is not given with sufficient definiteness.

The Court: Overruled.

The Witness: Well, it is definite enough in this way, that the man came in and showed me the injury he received.

Q. Well, what did he show you?

A. He lifted up his pants, the leg of his pants, to show me exactly what damage was done.

Q. Well, did you see something there when he lifted——

A. I seen it—I saw a bruise there.

Q. Did he unbutton any other part of his clothing?

A. Absolutely not, sir. He was just lifting up the leg of his pants.

Q. Did you make a report?

A. I made a report, yes, sir. I haven't seen the report since, and I don't know exactly what I put on it, outside of the injury to his leg.

Q. I see. I will just show you this and ask you if that refreshes your recollection as to whether that is a copy of it?

A. Yes, sir.

Q. Is that it?

A. Yes, sir; that is the report, because I sent him up to the doctor, I told him to go to the doctor and he said he did not have to go to the doctor.

Q. What doctor are you referring to?

A. I am referring to Dr. Lenahan, the ship's, or the company's doctor.

Q. Where is he located?

A. He was located at Pier 61, upstairs; or if he did not want to go that far we had Dr. Glagg at Pier 58, but I don't think Dr. Flagg was there at the time; I am not certain of that, sir.

Q. Is there a medical department at Dr. Lenahan's?

A. There is a medical department there; yes, sir. And Dr. Flagg has a medical department also.

[fol. 131] Q. Do you recall more precisely about what time you saw him?

A. I will tell you frankly it was before noon.

Q. Did you see him thereafter at any time during the day?

A. That day, if I recall correctly, I think it was a Saturday.

Q. Yes.

A. And we go home at noontime. I am pretty sure of that now.

Q. Yes.

A. So I don't recall seeing him after that.

Mr. Parmer: I recognize I have no right to offer this without your consent.

Mr. Gair: I do not consent to it. He testified.

Mr. Parmer: Very good. That is all.

Cross-examination.

By Mr. Gair:

Q. You were in the office, and the office that you were in was at the United States Lines?

A. Yes, sir.

Q. Was this the office to which complaint of injury being sustained was properly made with respect to the Roosevelt Steamship Company?

A. Right, sir; at Pier 58.

Q. In other words, the office of the owners of the Roosevelt Steamship Unicoi is the same office as the United States Lines?

Mr. Parmer: I object to that, your Honor, unless there is proof by a qualified person.

The Court: I will let him testify to that if he knows.

Mr. Parmer: All right.

Q. The office of the United States Lines is the office of the owners of the steamship Unicoi?

A. So far as I am concerned, we were working for the American Pioneer Line.

Q. Well, in that office——

A. At Pier 58.

[fol. 132] Q. At the office on Pier 58, working for the American Pioneer Lines, were you properly charged with the duty of making reports of injuries sustained on the steamship Unicoi?

A. On Pier 58.

Q. Yes; and you were told how it happened?

A. Yes, sir.

Q. By Mr. Brady?

A. Yes, sir.

Q. You heard about this ladder and what had occurred?

A. Right.

Q. When he told you about the injury, or showed you his leg, do you remember what the nature of the injury was then, what you actually saw?

A. I actually saw a bruise.

Q. And do you remember the extent of it?

A. Well, in what way, sir?

Q. I mean was it large, as big as a nickel or a quarter, or how large?

A. No, it wasn't; it was not large enough for him to go to the doctor.

Q. You suggested that he go and see the doctor?

A. I suggest that to anybody that is injured.

Q. And have you any recollection as you sit here now of the extent of the bruise, how large an area it covered, whether it was as big as the palm of your hand or less?

A. No; I would say it covered about an inch or an inch and a half.

Q. Where as it located?

A. Right around his leg, which leg I don't know.

Q. I wouldn't expect you to remember that. Was it below the knee?

A. Below the knee.

Q. And did he point to any other part?

A. No, sir.

Q. He just raised up and said, "Look what happened to me"?

A. Right.

Q. All his talk with you about this accident was a few minutes?

A. Oh, about five minutes.

Mr. Gair: That is all.

[fol. 133] (Testimony of Dr. Irvin Balensweig omitted.)

The Court: Anything further?

Mr. Parmer: No, sir.

The Court: That is the defendant's case. Have you any rebuttal?

Mr. Gair: No, I do not.

The Court: All right. Recess until a quarter past two.

(Recess to 2.15 p. m.)

Afternoon Session

Motion for Dismissal and Directed Verdict and Denial Thereof

Mr. Parmer: I renew the motion made at the end of the plaintiff's case, and I also move, further, for a dismissal and a directed verdict, on the ground that there is no proof here of any invitation on the part of the defendant or of anybody else, for that matter, to the deceased to use the particular ladder on which he was at the time.

The Court: I think that is all a question of fact. I will deny the motion and give you an exception.

How about the age of the plaintiff?

Mr. Gair: I have not been able to find anything on that, so far as I can learn.

The Court: She was 62?

Mr. Gair: And you were telling me about the complaint saying she was 61. At the time the action was actually commenced I am informed she was 61, but at the time of her husband's death she was 57.

The Court: I don't remember what she said, but I have got it 57.

Mr. Gair: 58 I think she said she was at the time of her husband's death.

[fol. 134] The Court: 57; but I may have gotten it wrong. Ask her what it was.

Mr. Gair: Mrs. Brady, what was your age at the time of your husband's death?

Mrs. Brady: 57.

Mr. Gair: Just 57?

Mrs. Brady: Yes.

The Court: 57. Then I did have it right in my notes.

Mr. Gair: It is agreed between the attorneys that Mr. James A. Brady, the deceased, would have been compelled to retire at the age of 70, had the right optionally to retire at the age of 68, but that if he retired at the age of 70 he would then be retired at the rate of $1,200 a year.

(Mr. Palmer summed up to the jury on behalf of the defendant.)

(Mr. Gair summed up to the jury on behalf of the plaintiff.)

(Short recess.)

Charge of the Court

The Court (Coxe, J.): Members of the jury: this is an action by Mrs. Brady as administratrix of her deceased husband's estate, to recover against the Roosevelt Steamship Company, Inc., damages for the alleged wrongful death of her husband. The complaint, for procedural reasons, has divided the claim into two parts, or, as they are described in the complaint, separate causes of action; one for the alleged pecuniary loss sustained by Mrs. Brady as a result of the death of her husband, and the second alleged

cause of action for the alleged pain and suffering sustained by her deceased husband during the period from July 9, 1938, to the time of his death on July 20, 1938. Those two separate causes of action have to be considered separately, [fol. 135] inasmuch as they cover entirely different subjects, both, of course, relating to the alleged injury.

In both causes of action it is alleged that the deceased was a Customs inspector employed by the United States Government; that on July 9, 1938, he was ascending a ladder on the side of the steamship Unicoi, operated by the defendant steamship company, which at the time was located at Pier 58, North River, in this city, when a rung on the ladder broke and he sustained injuries from which he subsequently died; that the ladder was defective or out of repair, due to the negligence of the defendant, and that as I have already stated, the deceased died as a result of this alleged negligence of the defendant corporation.

The answer of the defendant is, in substance, a general denial. There are, it is true, other legal defenses which are set up in the answer, which are of no particular concern to the jury at this time.

The testimony is not in serious dispute, especially with respect to the occurrence of the accident. The deceased was, at the time of his death on July 20, 1938, 62 years of age, and Mrs. Brady has testified that he had at that time been in the Customs service for 38 years and was in receipt of a salary of $2,900 a year. He left surviving him his widow, Mrs. Brady, who at the time of his death was 57 years old, and two minor children, one a boy 20 years of age, and the other a girl 15 years of age.

Mrs. Brady also testified that her husband supported the family, gave to her $25 a week for the ordinary maintenance of the family, provided for the education of the children and, in general, contributed toward the support of the family.

There was testimony, which I think is substantially uncontradicted, to the effect that the deceased started to go up a ladder at about 9 a. m. on July 9, 1938, at Pier 58, [fol. 136] North River, where the steamship Unicoi had just docked; that he had gone up the ladder about 13 rungs when one of the rungs broke and, according to the testimony of the witness Dankelman, he was seen swinging and trying to obtain some kind of a foothold on the ladder. He did not fall to the dock or into the water, but apparently

found his footing on the rung immediately underneath the one which had broken, or some lower rung in the ladder.

There was also testimony to the effect that the rung on which the deceased was standing, broke in the middle, and the condition of the rung was characterized, as I remember, by the witness Lyons, as "rotten."

The deceased, after he had found his footing, proceeded up the ladder and over the bulwark and onto the deck, and apparently completed the work that he was engaged in when he proceeded to go on board the vessel.

There is further testimony that sometime in the morning the deceased went back into the office and complained of feeling some pain.

Mrs. Brady has testified that between 3 and 4 o'clock in the afternoon of July 9, 1938, which was a Saturday, the deceased came home and complained about feeling pain in his side, and that at 8 o'clock he succeeded in reaching Dr. Lopez and was examined by him for his injuries. I am not going to attempt in any way to review the medical testimony in this case. You have heard the doctors called on behalf of the plaintiff, namely Drs. Lopez and Adams, and also the doctor called this morning on behalf of the defendant, Dr. Balensweig.

Dr. Lopez testified that on the first examination, on the evening of July 9, 1938, he diagnosed the case as contusions and abrasions, and did not at that time think that there was anything wrong with the appendix. The deceased stayed either in bed or at home during the following week, and on July 16, 1938, he went to the hospital, was [fol. 137] examined further, and on the evening of that day was subjected to an operation.

Dr. Lopez testified that after the operation had been made he then saw at once that there had been some peritonitis and that the matter was serious.

The deceased died in Yonkers on July 20, 1938. That in substance is the story as it has been narrated here by the witnesses, and I am not undertaking to go into it in any detail, and you will, of course, understand that I am not attempting to cover it in any detail.

Questions which have been raised by the defendant are as to whether there was any negligence which resulted in the death of the deceased, and then as part of that main question there is this subsidiary question which has been raised by the defendant with respect to whether the de-

ceased was justified in using this ladder at the time he attempted to board the steamship Unicoi. The second question is whether the death of the deceased was proximately caused by the injuries which the plaintiff says the deceased sustained on July 9, 1938 when the rung on the ladder broke.

Now with respect to the first question, namely, of negligence, the story has come largely from the witnesses called by the plaintiff, that is by Mrs. Brady as administratrix of her deceased husband's estate, and there has been substantially no contradiction in that story.

On the subsidiary question as to whether the deceased was justified in using this ladder, there was testimony by the witness Lyons, who was also a Customs inspector, associated with the deceased on this particular job, to the effect that at various times in the past he had used ladders of this kind in boarding vessels which had come in from outside, and there is no testimony to the contrary in that respect. Neither is there any testimony to indicate that at any time the steamship company ever questioned the right [fol. 138] of Custom inspectors to proceed in their line of duty in the way that it has been shown that the deceased proceeded at the time of his injury.

The other question, which has been argued very fully by counsel, concerns the medical testimony, and I think that you are in a much better position to determine that question than I am, and I doubt very much whether I can give you any help by any comment whatever. It does not seem, however, to be very seriously disputed that the deceased did fall, and that there was some injury of some kind, and it is of course true that on the night of July 9, 1938 he did go to Dr. Lopez, who has testified very fully here at the trial.

However, as I have stated, that is a question which the jury will have to determine for themselves.

If you find that the deceased was injured as a result of the negligence of the defendant, and that that injury resulted in his death, you then come to the question of damages, and in a case of this kind the law justifies this splitting up, as I have already indicated, of the claim into these two parts, and I should like very briefly to comment upon the first cause of action, or the first part in which the plaintiff is claiming merely for the pecuniary loss which she and her dependent children have sustained as the result of the death of her deceased husband.

In that cause of action there are first these out of pocket expenses, and there are only three of them in the record in the case, namely, the funeral expense, $480; the expense of the Yonkers Hospital, $46; and then the bill of Dr. Lopez of $300, making a total of $826.

The second part of the claim relates entirely to this question of the actual pecuniary loss sustained by Mrs. Brady as a result of the death of her deceased husband. And on that part of the claim it is the law that if she is entitled to recover in this first cause of action she may recover for the benefit of herself and her dependent children such a sum as you may determine to be the present [fol. 139] cash value of the reasonable expectancy of pecuniary advantage to her during her widowhood and while dependent, and the pecuniary advantage to the two minor children while dependent and until they reach the age of 21 years.

I don't know whether you understand that language, but in substance all it means is that she is entitled to recover on that cause of action the present cash value of this reasonable expectancy for her benefit and for the benefit of her minor children.

The testimony, as I recall it, on that phase of the case is that, according to the mortality tables, the deceased, Mr. Brady, had an expectancy at the time of his death of 12½ years, and that Mrs. Brady was at that time 57 years of age; and I need not go over the testimony which I have already commented on with respect to his earnings. How much she might, for her benefit and the benefit of her children, reasonably expect during that period is largely a question for the jury to determine. Obviously, she could not reasonably expect the full $2,900, because he would require something for his own maintenance and for his own expenses, but there must be some figure less than that which the jury might determine that she would be justified in expecting. And then there is this additional limitation, which was covered by a stipulation at the end of the trial, to the effect that in the Government's service Mr. Brady, the deceased, would have had to retire at the age of 70, at which time he would receive a pension of $1200, so that there would then again be some limitation in that respect, although of course it would not preclude him, I suppose, from the possibility of some expectation that he might obtain some other employment.

So much for the damages with respect to the first cause of action.

[fol. 140] On the second cause of action, which I have already stated is merely for pain and suffering of the deceased, Mr. Brady, during the period of July 9, 1938 to the time of his death on July 20, 1938, that period of roughly eleven days, that is a question entirely in the hands of the jury. And there is, of course, some testimony here in the case with respect to that pain and suffering, but as I have already stated, there should be separate verdicts with respect to the first and second causes of action.

The plaintiff in this action is required to prove her case by a fair preponderance of the evidence, and that burden follows her throughout the trial. The rulings of the Court during the trial were on questions of law, and are of no concern whatever to the jury, and should not influence you one way or the other in so far as your deliberations are concerned. Your verdict in this case may be, on the first cause of action, for the plaintiff for such amount as you think plaintiff is entitled to for the death of her husband, and included in that are these three items of expense aggregating in amount $826. Or it may be for the defendant on the first cause of action. Your verdict on the second cause of action may be for the plaintiff for such an amount as you may determine that she is entitled to, to cover the pain and suffering, if you find that there was such pain and suffering, of the deceased, Mr. Brady, during this period of eleven days prior to his death. Or it may be for the defendant.

Are there any requests to charge, or any exceptions to the charge?

Mr. Gair: There are no exceptions. I ask your Honor to charge, in line with the memorandum handed to your Honor, that if the jury find that the defendant's negligence was responsible for the deceased's initial injury but that his death was caused or contributed to by——

The Court: Well, I don't think I need charge that, but all it amounts to is that if they find that the death was caused, [fol. 141] as we say, proximately—I say caused—by this particular injury, through the negligence of the defendant, then there may be a recovery.

Mr. Gair: That is not the point I was coming to. But if the doctor's malpractice, as is claimed by Mr. Parmer,

may have caused his death, if the jury find that the initial injury was caused by the defendant's negligence, then the defendant is nevertheless responsible for the death of the deceased.

The Court: I don't like to go into the question of malpractice. I see what you mean, but I think what I have stated covers the situation. However, if the jury find that Dr. Lopez made a mistake and they also find that the deceased's death was caused by this injury due to the negligence of the defendant, than I——

Mr. Gair: That the doctor's mistake will not excuse the defendant.

The Court. No. However, I leave the whole question to the jury. Have you anything, Mr. Parmer?

Mr. Parmer: No exceptions or requests.

The Court: Good. It is now a quarter past four. I wish you would listen to this oath. It may be of use to you some day.

(A bailiff was sworn, and the jury retired in his care at 4:15 p. m.)

The Court: If there are any exhibits you need, you may send for them; otherwise they won't be sent to the jury room.

(At 6:30 p. m. the jury addressed a note to the Court, reading: "Your Honor, would our finding in the second action be 'No damages', or what is the proper wording?" Signed "Foreman". To which the Court replied: "If the jury finds that the plaintiff should not recover anything on the second cause of action it should report 'For the defendant on the second cause of action'.")

The Court: Counsel state they have no objection to the note from the jury or to the reply.

[fol. 142] VERDICT

(At 6.42 p. m. the jury reported they had agreed upon a verdict, and were returned to the courtroom at 6.47 p. m.)

(Roll called; all present.)

The Clerk: Mr. Foreman, have the jurors agreed upon a verdict?

The Foreman: We are.

The Clerk: And how say you?

The Foreman: We find for the plaintiff in the first cause of action in the sum of $19,000, which includes the three amounts mentioned. In the second cause of action we find for the defendant.

The Clerk: Members of the jury, listen to your verdict as it stands recorded: We find for the plaintiff in the first cause of action in the amount of $19,000, which includes the three amounts mentioned. We find for the defendant in the second cause of action. And so say you all.

The Foreman: Yes, sir.

Motion to Set Aside Verdict and Denial Thereof

Mr. Parmer: Your Honor, I move to set aside the verdict on the first cause of action, on the ground that it is contrary to the law, and on all the exceptions taken during the trial, and also on the grounds stated in Section 549 of the Civil Practice Act, except on the ground of inadequacy.

The Court: I will deny the motion. I can't say that that is an excessive verdict.

Mr. Parmer: And I also move to set aside the verdict as a whole, on the ground that they are inconsistent with each other.

The Court: No, I don't think that, either. I think they are quite consistent.

Mr. Parmer: Exception.

The Court: All right.

Thank you, members of the jury.

[fol. 143] In United States District Court

Note Re Exhibits

Plaintiff's Exhibits 1 and 3 are not printed.

Plaintiff's Exhibit 2 is the same as the operating agreement printed at page 28 in support of the motion to dismiss.

Defendant's Exhibits A and B are not printed.

Defendant's Exhibits C and D are not printed but the originals (consisting of numerous bills and vouchers) are permitted to be handed to the Court at the argument.

IN UNITED STATES DISTRICT COURT

JUDGMENT—October 25, 1941

The above entitled action having been duly tried before Mr. Justice Alfred C. Coxe and a jury at a Stated Term of the United States District Court for the Southern District of New York, on the 17th, 20th and 21st days of October, 1941, and the jury having duly rendered a verdict in favor of the plaintiff, Margaret Brady, as Administratrix of the goods, chattels and credits of James P. Brady, deceased on the 1st cause of action against the defendant Roosevelt Steamship Company, Inc., in the sum of $19,000.00, and the interest on the said amount from the 20th day of July, 1938, the date of the decedent's death until October 22, 1941, being $3,714.50 and a verdict for [fol. 144] the defendant, on the 2nd cause of action, and the costs of the plaintiff having been taxed in the sum of Forty-five and 50/100 Dollars.

Now, On Motion of Klein, Kinsley & Klein, attorneys for plaintiff it is

Adjudged that the plaintiff, Margaret Brady, as Administratrix of the goods, chattels and credits of James P. Brady, deceased do recover of the defendant, Roosevelt Steamship Company, Inc., of 1 Broadway, New York City, the sum of $19,000.00 plus the sum of $3,714.50 interest thereon, plus the sum of $45.50 costs as taxed, making in all the sum of $22,760.00 and that the plaintiff have execution therefor, and the defendant have judgment dismissing the second cause of action.

Dated, New York, October 25, 1941.

George J. H. Follmer, Clerk of U. S. District Court, Southern District of New York.

[fol. 145] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 18, 1941

SIRS:

Please Take Notice that Roosevelt Steamship Company, Inc., defendant herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from so

much of the judgment entered herein on the 25th day of October, 1941, as provides for the recovery by the plaintiff in the above entitled action from the said defendant of the total sum of $22,760.

Dated, New York, November 15, 1941.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant, Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York.

To: Klein, Kinsley & Klein, Esqs., Attorneys for Plaintiff, 342 Madison Avenue, Borough of Manhattan, City of New York.

[fol. 146] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

STIPULATION AND ORDER AS TO EXHIBITS

It is Hereby Stipulated and Agreed that the originals of defendant's Exhibits "C" and "D" marked for identification, consisting of numerous bills and vouchers showing payments by the Maritime Commission, may be handed up to the Court at the argument of the above entitled appeal and that they need not be reproduced in the record on appeal.

Dated, New York, January 26, 1942.

Klein, Kinsley & Klein, Attorneys for Plaintiff-Appellee. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant-Appellant.

So ordered, January 29, 1942.

Learned Hand, U. S. C. J.

[fol. 147] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, February —, 1942

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Defendant. Klein, Kingsley & Klein, Attorneys for Plaintiff.

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1941

No. 252

(Argued April 15, 1942. Decided May 16, 1942)

MARGARET M. BRADY, as Administratrix of the Goods, Chattels and Credits of James P. Brady, Deceased, Plaintiff-Appellee,

against

ROOSEVELT STEAMSHIP COMPANY, INC., Defendant-Appellant

Appeal from a judgment, of the District Court for the Southern District of New York, for the plaintiff in a suit to recover for the death of her intestate as the result of injuries received while attempting to board a vessel. Reversed.

Before Augustus N. Hand, Chase and Clark, Circuit Judges

Klein, Kinsley & Klein, Attorneys for Plaintiff-Appellee; August P. Klein and Benjamin H. Siff, of Counsel.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Roosevelt Steamship Company, Inc., Raymond Parmer, Vernon Sims Jones, of Counsel.

[fol. 150] CHASE, Circuit Judge:

The appellee's intestate, a United States customs inspector, was injured when attempting, in the performance of his duties, to board the S. S. Unicoi on the morning of July 9, 1938 when that vessel was docked at Pier 58, North River. His injuries, caused by the breaking of one of the rungs in a defective ladder which had been lowered from the ship for his use in coming aboard, were so serious that they caused his death in the Yonkers General Hospital at Yonkers, N. Y., on July 20, 1938. The appellee, his widow, was duly appointed his administratrix.

The S. S. Unicoi was a vessel owned by the United States Maritime Commission which was operated for the Commission by the appellant, the Roosevelt Steamship Company,

Inc., under a contract with the Commission. The Roosevelt Steamship Company, Inc., was, and is, a private corporation, none of its stock being owned directly or indirectly by the United States.

The appellee sued the Roosevelt Steamship Company, Inc., in the New York Supreme Court to recover the damages, caused by her husband's death, for the benefit of herself and her children. That suit was removed by the appellant to the District Court for the Southern District of New York and there tried to a jury on the law side of the court after the denial of the appellant's motion to dismiss on the ground that the court had no jurisdiction because the appellee's remedy, if any, was exclusively under the Suits in Admiralty Act (46 U. S. C. A. §§741, 742). The only issue on this appeal is that of jurisdiction so raised and decided below.

The appellee relies upon our recent decision in *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2) 190, to show the liability of the appellant as the operating agent for the tort which caused the death of her husband. That is [fol. 151] not enough, however, to make that decision controlling here. The tort in the *Quinn* case was not maritime. *Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179. Consequently no suit could have been maintained in admiralty against anyone because of it and our decision was without regard to what effect the Suits in Admiralty Act might have upon proceedings to recover the damages caused by a tort maritime. That is the kind of tort involved in this suit. *Vancouver S. S. Co.* v. *Rice*, 288 U. S. 445; *The Admiral Peoples*, 295 U. S. 649; *The Shangho*, 88 F. (2) 42.

That being so, the appellee was entitled to sue under the Suits in Admiralty Act. *Eastern Transp. Co.* v. *United States*, 272 U. S. 675. Nor can it be doubted that that statute provided the exclusive remedy in admiralty against the Commission or the United States. *U. S. Shipping Board Emergency Fleet Corp.* v. *Rosenberg*, 276 U. S. 202. It has also been settled just as definitely that an action in admiralty is the only available remedy against the United States or a corporation whose stock is wholly owned by the United States. *Johnson* v. *Fleet Corporation*, 280 U. S. 320.

Nevertheless the appellee insists that where a private corporation is the contracting operator of a vessel owned

by the United States, or by the Maritime Commission which is here to be treated as the United States, that private corporation is suable as it would have been were there no Suits in Admiralty Act to be considered.

In taking that position we think the appellee fails to realize the full significance of the decision in the *Johnson* case, *supra*. And it may be that this is so because too much regard has been given to the thought that if the appellee recovers the judgment will neither be against the government directly or indirectly nor will the United States be compelled to reimburse the agent for the damages it may pay as a result of its own negligence either by the [fol. 152] terms of the operating contract or by general principles of law. Restatement of Agency, § 440 (a). Granted that this is so, it is not decisive for the Suits in Admiralty Act goes beyond the mere protection of any pecuniary interest of the government. A prime purpose of the statute was to prevent the seizure in ports of the United States of vessels owned by the government or its wholly owned corporations in actions *in rem*. No distinction was made between seizures from a private operating corporation and from an operating corporation owned by the government. Whenever a suit in admiralty could have been maintained against the ship or the owner, if the ship had been privately owned and operated and it was a merchant ship, the right otherwise to sue was taken away and replaced by the right to sue the United States or its wholly owned corporation *in personam* but, at the election of the libellant, with all the advantages of a suit both *in personam* and *in rem*. The Act in terms provides that a vessel shall not be subject to arrest or seizure by judicial process in the United States if, *inter alia*, it is operated "by or for the United States or such corporation" and in § 2 the right to sue *in personam* as above is given. In the *Johnson* case, *supra*, it was held that "the remedies given by the Act are exclusive in all cases where a libel might be filed under it." In one of the appeals considered in that opinion the United States owned the merchant vessel "Coelleda" which was "operated for it by the Navigation Company as agent pursuant to an agreement made by the United States acting through the Shipping Board represented by the Fleet Corporation." Apparently the Navigation Company was in all material respects in the position of the Roosevelt S. S. Co., Inc., as the agent in

this instance. It and the Fleet Corporation were both sued at law by an injured seaman. In holding that the exclusive remedy was under the Suits in Admiralty Act, it was said that, "Putting the United States and the [fol. 153] Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the Act." We feel precluded from construing "other agents" under the principles of *eiusdem generis* as other agents whose capital stock is wholly owned by the United States and whose losses would be borne directly or indirectly by the United States by the fact that the operating agent of the "Coelleda" seems to have been just such an agent as was here sued and obviously was included in the phrase "other agents" as used in *Johnson* v. *Fleet Corporation, supra.* So, therefore, is this defendant. Compare *Shea* v. *Export S. S. Corp.*, 253 N. Y. 17, 170 N. E. 477.

Judgment reversed with directions to dismiss the complaint.

CLARK, *C. J.* dissents with memorandum.

CLARK, *Circuit Judge* (dissenting):

The Suits in Admiralty Act, 46 U. S. C. A. §§741, 742, is quite explicit in setting forth its apparent limits of applicability. By its first section it exempts from seizure or arrest vessels owned by the United States or a corporation with government-owned capital stock, or *operated by or for the United States or such corporation.* But the second section is carefully limited to the United States or such corporation; in terms it permits a libel *in personam* against them, which in *Johnson* v. *Fleet Corp., supra,* was held to be the exclusive remedy. Because in that case the Court, [fol. 154] in dismissing several claims clearly within the affirmative terms of the statute, included one for seamen's maintenance and cure against the Fleet Corporation and the operator—referred to only summarily as "other agents"—we have our present problem.

Did the Court deliberately plan to take away rights of litigants to sue generally in all cases against operators? In *Shea* v. *Export S. S. Corp., supra,* 253 N. Y. at page 22, the court says, however, that the accepted test is whether it sufficiently appears that "directly or mediately, the money required to pay a judgment against [defendants] would come out of the United States." That seems a rational stopping point for statutory emendation; but we pass it here. We are not dealing with operating expenses for which the United States must provide the money under the operating contract, but for wrongdoing—negligence—of the operator. In *Quinn* v. *Southgate Nelson Corp., supra,* we held the operator liable for negligence. If, as I believe, government liability is the controlling test, we cannot distinguish the *Quinn* case, because there the vessel was navigated into a bridge, while here a vessel at rest had a defective ladder to the wharf. Counsel suggested that the government in fact would provide reimbursement to the operator here; but that would seem favor, not right. This holding considerably extends the statute beyond anything yet directed by the court and deprives litigants of rights which, as seemingly here, may be most important. I doubt if we should so take the initiative.

[fol. 155] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of June one thousand nine hundred and forty-two.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

MARGARET M. BRADY, as Administratrix of the Goods, Chattels and Credits of James P. Brady, Deceased, Plaintiff-Appellee,

v.

ROOSEVELT STEAMSHIP COMPANY, INC., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs, with directions to dismiss the complaint.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 156] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Margaret M. Brady, as Administratrix, etc., v. Roosevelt Steamship Co., Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 4, 1942. D. E. Roberts, Clerk.

[fol. 157] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 158] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 269

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Simone N. Gazan. File No. 46,763. U. S. Circuit Court of Appeals, Second Circuit. Term No. 269. Margaret M. Brady, as Administratrix of James P. Brady, Deceased, Petitioner, vs. Roosevelt Steamship Company, Inc. Petition for a writ of certiorari and exhibit thereto. Filed July 31, 1942. Term No. 269 O. T. 1942.

(2959)